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No.

IN THE

Supreme Court of the United States

October Term, 1991

IGNAZIO ANTONINO MANNINO, EMANNUELE SALVATORE MANNINO and ENZO VARISCO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(6888—LC4-442)

Questions Presented for Review

1. Whether the Government's failure to contemporaneously minimize intercepted communications or to inform the Court during the wiretaps that minimization would have to wait precluded their admission into evidence?

2. Whether Stefano Zito's statements to Kane, which were clearly not in furtherance of the conspiracy, were erroneously admitted into evidence?

3. Whether the admission and misuse of testimony that various alleged co-conspirators had pleaded guilty deprived Petitioners of a fair trial and due process of law?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE THIRD CIRCUIT COURT OF APPEALS

United States of America, Appellee

Francesco Gambino, Appellant
in No. 89-2087

Ignazio Antonino Mannino, Appellant
in No. 89-2088

Emannuele Salvatore Mannino, Appellant
in No. 89-2089

Grace Pulitano Mannino, Appellant
in No. 89-2090

Enzo Varisco, Appellant
in No. 90-1034

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In The

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IGNAZIO ANTONINO MANNINO,
EMANNUELE SALVATORE MANNINO and,
ENZO VARISCO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATED COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the District Court in certain pre-trial matters was published in ***United States v. Gambino***, 728 F.Supp. 1150 (E.D. Pa., 1989).

The opinions of the Trial Court concerning the issue of minimization appears in Appendix A1, ***et seq.***.

The opinion of the Court of Appeals Captioned as ***United States of America v. Gambino***, ___F.2d___ (3rd Cir. 1991), appears in Appendix B7, ***et seq.***.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1). The Third Circuit Court of Appeals affirmed Petitioners' convictions and sentences on March 4, 1991. (A7)

CONSTITUTION AND STATUTES INVOLVED

UNITED STATES CONSTITUTION
AMENDMENT IV - SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons of the things to be seized.

STATEMENT OF THE CASE

Petitioners, Ignazio Antonino Mannino, Emannuele Salvatore Mannino and Enzo Varisco, were charged with conspiracy to import heroin, 21 U.S.C. Sec. 963; conspiracy to distribute heroin, 21 U.S.C. Sec. 846; conspiracy to distribute cocaine, 21 U.S.C. Sec. 846 and money laundering, 18 U.S.C. Sec. 1956(a)(1).

Petitioners were tried to a jury with co-defendants Francesco Gambino, Grace Pulitano Mannino (the wife of Ignazio Antonino Mannino) and Carlo Fodera, before the Honorable Louis C. Bechtle, U.S.D.C.J., from July 21, 1989 through September 7, 1989. Petitioner, Ignazio Antonino Mannino, was convicted of conspiracy to import heroin in violation of Title 21 U.S.C. Sec. 963 and conspiracy to distribute heroin of 21 U.S.C. Sec. 841(a)(1). Petitioner Enzo Varisco was convicted of conspiracy to distribute cocaine in violation of 21 U.S.C. Sec. 846. Petitioner Emannuele Salvatore Mannino was convicted of conspiring to import heroin, in violation of 21 U.S.C. Sec.

963 and conspiring to distribute heroin in violation of 21 U.S.C. Sec. 846. He was also convicted of money laundering, in violation of 18 U.S.C. 1956 (a)(1).

Ignazio Antonino Mannino was sentenced to a total of twenty seven years imprisonment, five years supervised release and fined $25,000.00. Emannuele Salvatore Mannino received a total of eighteen years imprisonment, five years supervised release and fined $25,000.00. Petitioner Varisco was sentenced to fifteen years imprisonment, five years supervised release and fined $10,000.00.

On March 4, 1991, the Court of Appeals affirmed each of the convictions. The Petitioners are currently incarcerated pursuant to the Judgment of Conviction.

Each of the Petitioners participated in telephone conversations which were intercepted by the government. The government introduced telephone calls made to the home of Ignazio Antonino Mannino. The wiretapped conversations of Petitioners were in the Sicilian dialect of the Italian language. The Mannino wiretap was extended several

times and lasted about six months. Most, if not all, of the intercepted conversations were minimized after the fact. No judge was ever advised during the course of the interceptions in any of the court ordered seven day reports that there was any problem concerning contemporaneous minimization using Sicilian-fluent translators.

A hearing was conducted to determine if the statutory requirement of minimization had been violated. The FBI case agent testified that the investigation was code named Iron Tower. It targeted narcotics trafficking by alleged members and associates of the Sicilian Mafia. The case was initiated in March of 1986. Despite the fact that it was anticipated that many conversations would be in the Sicilian dialect only one translator was employed. No attempt was made to hire additional translators until a point had been reached where additional resources would be needed. Therefore, the government conceded that most, if not all, conversations were minimized after the fact.

The agent was responsible for preparing seven day reports submitted to the Court in conjunction with electronic

interception. He admitted that he did not advise the Court with regard to the interceptions that no simul- taneous minimization was occurring. Ultimately it was stipulated by the government that no Judge was advised in any seven day report of any problem with regard to Sicilian translators. At the trial, two informants testified for the government. Timothy Zepp, who had been arrested for selling cocaine to an undercover agent, testified that he purchased cocaine from Petitioner Varisco either at Varisco's home or his pizzeria. In addition, Lillian Sotomayor, an admitted drug user who had been given immunity from prosecution and money by the government, testified that she assisted her boyfriend, Pietro Candela, sell cocaine to Varisco. In addition, William Kane, a convicted felon, testified that he began working in an undercover capacity for the government in October, 1986. Kane testified that he knew Ignazio Antonino Mannino and had been introduced to him by Simone Zito. Kane developed an especially close relationship with the brother of Simone Zito, Stefano. Although defense counsel below objected to any statements made by Stefano Zito to William

Kane as inadmissible hearsay, the Court below permitted Kane to testify that Stefano Zito had advised Kane that Torretta, Sicily, the hometown of Zito, was a town which produced heroin. Stefano Zito told Kane that women with large bosoms were selected as couriers to carry heroin during the winters. Stefano Zito described to Kane specifically how the heroin smuggling operation supposedly operated. Kane was also permitted to testify that Stefano Zito advised him that Simone Zito, along with Petitioner Emannuele Salvatore Mannino, accompanied Simone Zito's wife on a trip to Sicily to exchange cocaine for heroin.

Kane was also permitted to testify over objection that Stefano Zito had advised him that Simone Zito and Petitioner Ignazio Antonino Mannino were getting into the cocaine business. Kane further testified about a heroin transaction between himself and Simone Zito. This transaction occurred on October 21, 1987.

Another cooperating witness for the government was Robert Reyers, an individual who is a defendant in the case and who, during the course of the trial, changed his plea to

one of guilty. Reyers testified that he knew Bill Kane as a customer and was acquainted with Simone Zito. He further testified that Stefano Zito told him that Simone Zito and Ignazio Antonino Mannino were importing heroin into this country. Reyers also testified that Petitioner Ignazio Antonino Mannino attempted to ascertain whether Reyers could find out from his wife, a stenographer in the federal courts, if certain names were mentioned in the Grand Jury. Reyers testified that he obtained such information from his wife and gave it to William Kane and Simone Zito. Reyers testified further that Simone Zito had made a statement to Reyers that Petitioner Ignazio Antonino Mannino had gone to Florida to see if he could purchase cocaine from an individual named Sal Rina. Reyers further testified that Simone Zito referred to Petitioner Ignazio Antonino Mannino as "his partner".

REASONS FOR GRANTING THE WRIT

POINT I

Wiretapped conversations not contemporaneously minimized without good cause must be suppressed in their entirety.

From its inception, this investigation targeted Sicilian-speaking and bi-lingual alleged members and associates of the Sicilian Mafia. Therefore, it was reasonably foreseeable that many conversations would be spoken in Sicilian. In ***United States v. Adamita***, 88 Cr. 217, S.D.N.Y., the Honorable John Sprizzo, presented with similar facts, ordered the suppression of a number of tapes because of a failure to minimize. Yet, applying the same statute to virtually identical facts, the Court in the instant case failed to suppress!

It has been stated that the requirements of the Fourth Amendment cannot be forgiven in the name of law enforcement. ***Berger v. New York***, 388 U.S. 41, 62 (1967). Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices. Although

Title III of the Omnibus Criminal Control and Safe Street Act of 1968 (18 U.S.C. Sec. 2510 *et. seq.*) authorizes a Court to order the interception of wire and oral communications, responsible officials, including judicial officers, must take care to insure that searches are conducted in a manner that minimizes unwanted intrusions upon privacy. ***Andresen v. Maryland***, 427 U.S. 463, 482 n. 11 (1976).

Title III as amended by the passage of Pub. L. 99-508. Section 106(c) added provisions relating to minimization where the intercepted communication is in code or foreign language. Specifically, the Amendment provides that where an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. 18 U.S.C. Sec. 2518(5).

The Third Circuit had stated in previous cases that the minimization requirement is satisfied if, on the whole, the government has shown a high regard for the right of privacy by doing all that they reasonably could to avoid unnecessary intrusion. ***United States v. Armocida***, 515

F.2d 29, 42 (3rd Cir. 1975).

In the instant case, the government exhibited no regard for the privacy rights of Petitioners as evidenced by the lack of candor the government displayed to the supervising court. It was stipulated, at the close of the suppression hearing, that the Trial Court had never been advised of the lack of minimization occurring in this case. The agent who was responsible for drafting the seven day reports submitted to the Court during the course of the execution of the interception orders, never took the time or the trouble to advise the Court that translators could not be contacted or hired to assist in the minimization process. Instead, the agent assumed that his conferences with attorneys in the United States Attorney's Office were sufficient to demonstrate compliance with minimization requirements. Obviously, they were not since the United States Attorney never informed the Court either of the lack of contemporaneous minimization.

The government took few, if any, steps to ascertain the availability and eligibility of interpreters in the Sicilian

language. Although several agents testified during the course of the trial that they had expertise in Sicilian, these agents were never contacted by the case agent to ascertain their availability to assist in the monitoring of the numerous wiretaps and bugs which had been placed by the government. Petitioners argue that such lack of effort hardly constitutes substantial compliance with the minimization requirements of Title III.

Indeed, the government's conduct in failing to contemporaneously minimize, ignored the mandate of Title III's requirements and violated the Fourth Amendment prohibition against general searches. The record below established that a high percentage of the calls which were intercepted were unrelated to, and beyond the scope of, the wiretap warrant. Literally thousands of conversations were intercepted and only about 400 of them were offered into evidence by the prosecution. No rationale justified the repeated, intentional, trespassory intrusions into the Petitioners' constitutionally protected area of privacy. For example, the conversations of children were regularly

intercepted during the course of the implementation of these orders, and non-pertinent conversations were frequently referred to in order to assist in identification. By committing numerous unjustified intrusions into the sanctity of the Petitioners' privacy, the government ignored the specific and unique directives of the warrants authorizing electronic surveillance. ***Berger v. State of New York***, supra, ***United States v. Heldt***, 688 F.2d 1238, 1253 (D.C. Cir. 1981). The conduct of the government herein was more than mere isolated instances of excessive monitoring which would clearly not require suppression. Rather, the continuous and pervasive acts of over monitoring and non-minimization were a clear violation of the law. Compare, ***Scott v. United States***, 436 U.S. 128 (1978) where this Court found execution of the interception orders to have been reasonable under the circumstances. See also, ***United States v. Armocida***, *supra*, 515 F.2d 29, 43.

In ***Armocida***, the Court noted several factors which were relevant to a determination of whether there had been substantial compliance with the statute. Specifically, the

Court pointed to the nature and scope of the criminal enterprise under investigation, the government's reasonable expectation as to the character of, and the parties to, the conversation and degree of supervision by the authorizing judge. ***United States v. Armocida***, *supra*, 515 F.2d at 44.

In Petitioners' case, the government was very well aware of the nature and scope of the criminal enterprise under investigation at the time it made its application for the warrants which were issued in this case. As evidenced by the early applications in this case, the government was relying upon information which it had gathered in prior cases to describe the nature and scope of the alleged instant conspiracy. Thus, the government was able to describe this case as a widespread narcotics conspiracy involving, in part, persons of Sicilian extraction as well as others. the government was able to identify many targets of the investigation at the point it applied for these warrants. The government knew at the time that it made its application that many of the individuals in this case would speak the Sicilian

dialect. Thus, unlike ***Scott v. United States***, *supra*, the nature and scope of the criminal enterprise was already ascertained by the government. And, the government not only had a reasonable expectation as to the character of and the parties to the conversations, but to a great extent knew the character of those conversations. Finally, it is conceded by the government that, with regard to the minimization requirement, there was utterly no supervision by the Court below.

Petitioners submit that the government failed to meets its burden of proving its conduct avoided unnecessary intrusions and that its conduct resulted in no greater invasion of privacy than was necessary under the circumstances. ***United States v. Armocida***, *supra*, 515 F.2d at 43. The government's flagrant and willful disregard of the Fourth Amendment rights of Petitioners demanded suppression of all evidence seized as a result of the execution of the wiretapped orders, and any evidence derivatively obtained.

Although this Court in ***Scott v. United States***, *supra*, 436 U.S. 128, specifically declined to define the

scope of suppression for failing to minimize, many Courts have agreed that total suppression of all intercepted conversations is mandated when the violation of statutory requirements of minimization is flagrant. See, ***United States v. Santora***, 600 F.2d 1317, 1320 (9th Cir.), *modified*, 609 F.2d 433 (9th Cir. 1979); ***United States v. Hyde***, 574 F.2d 856, 869 5th Cir., *reh.* and *reh. en banc den.*, (5th Cir. 1978); ***United States v. Turner***, 528 F.2d 143, 156 (9th Cir.), *cert. den. sub. nom.*, ***Grimes v. United States***, 423 U.S. 996 (1975), and *sub. nom.*, ***Hackett v. United States***, 429 U.S. 837 (1976); ***United States v. Suquet***, 547 F.Supp. 1034 1039 (N.D. Ill. 1982); ***United State v. Webster***, 473 F.Supp. 586, 598 (D. Md. 1979) *aff'd. in part, rev'd in part on other grounds*, 639 F.2d 185 (4th Cir. 1982), *cert. den.* 456 U.S 935 (1982); ***United States v. Curreri***, 363 F.Supp. 430, 437 (D. Md. 1973); ***United States v. Lanza***, 349 F.Supp. 929, 932 (M.D. Fla. 1972); ***United States v. Leta***, 332 F.Supp. 1357, 1360 n. for (M.D. Pa. 1971). Some Courts have gone further and required the total

suppression of all communications whenever the minimization requirement is violated. ***United States v. Focarile***, 340 F.Supp. 1033, 1047 (D. Md.), *aff'd. sub. nom.*, ***United States v. Giordano***, 469 F.2d 522 (4th Cir. 1977), *aff'd. on other grounds*, 416 U.S. 505; ***United States v. Scott***, 331 F.Supp. 233, 248 (D.C. Cir. 1971), *vacated on other grounds*, 504 F.2d 194 (D.C. Cir. 1974); ***People v. Brenes***. 42 N.Y.2d 41, 49-50, 396 N.Y.S.2d 629 (1977); ***State v. Cantania***, 85 N.J. 418, 426, 427 A.D. 537 (1981).

The reasons requiring total suppression in this case are manifest. First, it is the need for an effective detriment to the unlawful conduct of wire taps. Congress recognized the need to articulate the prohibition of the use of an oral communication intercepted in violation of Title 3. See, U.S.C. Sec. 2515. Second, when Courts fail to suppress, they ignore the exceptional dangers inherent in electronic surveillance. ***Berger v. New York***, *supra*. Third is the traditional reluctance of any court to accept as evidence material seized in direct disregard of the statute. Fourth,

were Courts to suppress selectively on an item by item basis, it would make minimization requirements under the statute illusory. As stated in ***United States v. Focarile***, *supra.*:

> "In this Court's opinion the minimization requirement of Section 2518(5) would be illusory if it were enforced on an item by item basis by means of suppressing unauthorized seizures at trial after interception is a fait accompli. Minimization as required by the statute must be employed by the law enforcement officers during the wire tap...Knowing the only "innocent" calls would be suppressed, the Government could intercept every conversation during the entire period of a wire tap with nothing to lose by doing so since it would use at trial only those conversations which had definite incriminating value anyway, thereby completely ignoring the minimization mandate of Title III. A conversation once

> seized can never truly be given back as could a physical object. The right of privacy protected by the Fourth Amendment has been more invaded when a conversation which can never be returned has been seized then where a physical object which can be returned has been seized."

See, ***United States v. Scott***, 331 F.Supp. 233, 246-249 (B.D.C. 1971); ***United States v. Leta***, 332 F.Supp. 1357, 1360 note for (M.D. Pa. 1971).

Fifth, the purpose of the minimization requirement is to prevent a wire tap from turning into a "general search and wholesale invasion of privacy." ***United States v. King***, 335 F.Supp. 523, 544-545 (S.D. Cal. 1971), *aff'd. in part, rev'd. in part on other grounds*, 478 F.2d 494 (9th Cir.), *cert. den. sub. nom.*, ***Light v. United States***, 414 U.S. 846 (1973). The overhearing of telephone conversations by interception, like a search of documents, poses an inherent danger of turning into a general search, due to the difficulty of ascertaining the relevance of the item to be "seized".

Where disregard of a warrant's limitations is flagrant and entire, the otherwise valid warrant may become a general one, in which case the fruits of the search must be suppressed. ***United States v. Heldt***, 669 F.2d 1238, 1259 (D.C. Cir. 1981); See, ***United States v. Sequet***, 547 F.Supp. 1034, 1039-1043 (N.D. Ill. 1982); ***United States v. Adamita***, 88 Cr. 217 (S.D.N.Y. 1989).

Failure to minimize in the instant case violated Petitioners' Fourth Amendment rights. The decision below by the Third Circuit ignored its own precedent as well as that of other circuits. As such, its departure calls for an exercise of this Court's power of supervision. Moreover, the refusal of the Third Circuit to reverse the District Court on minimization is in conflict with this Court's decision in ***Scott v. United States***, *supra.*, 436 U.S. 128.

As Justice Jackson once wrote "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers " ***Krulewitch v. United States***, 336 U.S. 440, 457, 69 S.Ct. 716, 725, 93 L.Ed. 790 (1949) (Jackson, J., concurring). This is

especially true where the conviction is for a narcotics violation at a time when the country is engaged in a "war on drugs." However, a courtroom is not the proper place in which to fight such a "war".

United States v. Eduardo Franco, 885 F.2d 1003, 1011 (3rd Cir. 1989).

POINT II

STEFANO ZITO'S STATEMENTS TO KANE WERE CLEARLY NOT IN FURTHANCE OF THE CONSPIRACY AND SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE.

The core of the Government's case against petitioners was the testimony of William Kane. Kane was a convicted felon who, in 1982, met an individual named Joe Gambino. In 1983, Kane and Joe Gambino became partners in a vending machine operation which gathered both individuals substantial amounts of money. Kane testified that he saw Mr. Gambino regularly at a coffee house known as Cafe Mlliano which subsequently changed its name to the Cafe Giardino. The neighborhood in which Cafe Giardino is located was described by Kane as a Scillian area which had many cafes similar to the Cafe Giardino.

Kane stated, In October of 1986, he met with FBI agent Stalarski. He agreed to talk to Stalarski about various individuals who frequented this area of Brooklyn. Kane testified that he knew Co-defendant Franceso Gambino from the Cafe as well as Simone Zito. Kane testified further that

he knew petitioner Ignazio Antonino Mannino and had been introduced to him by Simone Zito. Kane developed an especially close relationship with the brother of Simone Zito, Stefano. Although defense counsel below objected to any statements made by Stefano Zito to William Kane as inadmissable hearsay, the trial court permitted Kane to testify that Stefano Zito had advised Kane that Torreta, Sicily, the home of Zito, was a town which produced heroin. Kane testified further that Stefano Zito told Kane that women with large bosoms were selected as couriers to carry heroin during the winters. Stefano Zito described specifically how the heroin smuggling operation supposedly operated. Kane was also permitted to testify that Stefano Zito advised Kane that Simone Zito along with petitioner Emannuele Salvatore Mannino, the brother of petitioner Ignazio Antonino Mannino, accompanied Simone Zito's wife on a trip to Sicily to exchange cocaine for heroin.

Kane was permitted to testify further that Stefano Zito had advised him that Simone Zito and petitioner Ignazio Antonino Mannino were getting into the cocaine business.

Stefano also told Kane about a trip to Florida taken by Stefano. In addition, Stefano told Kane how he brought heroin into the United States in a gift box. The trip to Florida was a reward to Stefano for his successful heroin importation.

Over objection, Kane was permitted to testify that Stefano Zito had told Kane that Stefano Zito as well as Simone Zito and petitioner Ignazio Antonino Mannino were members of the mafia in Torretta, Sciliy. Kane testified further, over objection, that Stefano Zito also told Kane that Simone Zito and petitioner Ignazio Antonino Mannino had a cocaine network.

Counsel below vigorously objected and moved for a mistrial when the prosecution sought to elicit the contents of Stefano Zito's alleged statements to Kane, on the ground that Zito was not a co-conspirator and, even if he was, the statements were mere narrative and not in furtherance of the conspiracy. Although the trial court initially sustained counsel objections, the court subsequently admitted the testimony "subject to being tied up."

After the government rested, counsel again requested that the trial court make finding pursuant to ***Bourjaily v. United States***, 483 US 171 (1987), but the court stated that it would make these finding at the close of all "all" evidence. The court later ruled that various persons were co-conspirators including Stefano Zito as a co-conspirator in the heroin importation and distribution conspiracies, but did not include him as a co-conspirator in connection with the cocaine distribution.

Petitioners contend that the lower court erred, as a matter of law, in admitting Stefano's alleged co-conspirator hearsay. In the first place, Stefano Zito's alleged statements were highly suspect. Stefano may well have picked up bits and pieces of information from Simone Zito, his older brother, and because Stefano had, according to the testimony, "nothing to do", he embellished and enlarged upon them to make himself important in the eyes of friends such as Kane and Reyers. Stefano's assertion, ridiculous on its face, that "all three thousand people" living in Torretto, Sicily were involved in heroin manufacturing and smuggling

is precisely the kind of "grandiose puffing" that stamps both that assertion and the rest of his alleged statements as pure invention. When the "presumed" unreliability of co-conspirator heresay is recalled, Stefano's statements are entitled to no credence at all. See ***United States v. Silverman***, 861 F2d 571, 578 (9th Circuit 1988).

The requirements of Federal Rule of evidence 801(d)(2)(E) should not be read so broadly that anything said relating to a conspiracy is found to be in furthance of its objectives. Developments in the law, "Criminal Conspiracy" 72 Harv.L.Rev. 920, 985 (1959) As stated by a leading commentator, this is a result that the advisory committee on the rule sought to avoid by retaining the "in furtherance of" requirements. Weinstein's evidence, pages 801-236, 801-237 (Matthew Bender 1984).

Mere idle conversation or narrative are ordinarily not statements made in furtherance of the conspiracy and should not be admitted into evidence. See ***United States v. Phillips***, 664 F2nd 971, 1027 (5th Circuit 1981), cert. denied, 457 US 1136 (1982). In ***United States v.***

Provenzano, 620 F2nd 985, 1001 (Third Circuit), cert. denied, 449 US 899 (1980), the Third Circuit found that statements similar in nature to Stefano Zito's statements about his role in the conspiracy were not in furtherance of the conspiracy. In the case at bar, Stefano Zito's statements, purportedly to William Kane, were mere narratives of past events and did not further any goal of the conspiracy. Zito's statement to the witness concerning the town of Sicily and the alleged criminal activities of petitioner Antonino Mannino were not made to further any objective of the alleged conspiracy and were clearly not made for purposes of a cover-up. The "in furtherance of" requirement is a prerequisite to the admissability of statements offered as evidence under federal rule of evidence 801 (d)(2)(e). Cf., ***Krulewitch v. United States***, 336 US 440, 443-444 (1949).

This honorable court should grant review of the question presented so as to clarify the meaning of the "In furtherance of" requirement and set appropriate standards for the courts below to follow. It is respectfully submitted that,

upon a review of that requirement, reversal of the judgement below will follow.

POINT III

The admission and misuse of testimony that various alleged co-conspriators had pleaded guilty deprived petitioners of a fair trial and due process of law.

The admission of testimony by Robert Rarez, a co-defendant in the trial, that he had pleaded guilty and the use of that testimony in the prosecutor's summation deprived petitioners of a fair trial and due process of law.

A significant Constitutional question arises from the testimony of co-defendant Robert Reyers in the trial of this case. Reyers was indicted along with petitioners and late into the trial withdrew his previously entered plea of not guilty and entered a plea of guilty. In return for his plea, and for leniency, Reyers testified as prosecution witness against his co-defendants in this case.

Reyers testimony was that he knew William Kane, the key witness in this case, as a customer in his car dealership and was acquainted with Simone Zito. Reyers testified that Stefano Zito told him that Simone Zito and petitioner Ignazio Antonino Mannino were importing heroin

into this country. Reyers claimed that petitioner Ignazio Antonio Mannino attempted to ascertain whether Reyers could find out from his wife, a stenographer in the Federal courts, if certain names were mentioned in the Grand Jury. Reyers testified that he obtained such information from his wife and gave it to cooperating witness William Kane and Simone Zito. Reyers further testified that Simone Zito had made a statement to Reyers that petitioner Ignazio Antonio Mannino had gone to Florida to see if he could purchase cocaine from an individual named Sal Rina. Reyers also stated that Simone Zito referred to petitioner Ignazio Antonio Mannino as "his partner". Reyers testimony was over defense objection. Reyers testimony also included that he had pleaded guilty and that Kane had informed Reyers of many of the incidents about which Kane had testified, including the only two alleged purchases of drugs in the case, from Simone Zito and petitioner Ignazio Antonino Mannino on October 21 and 22, 1987.

The prosecutors use of Reyers testimony in summation seriously undermined the petitioners right to a

fair trial. The prosecutor stated:

> "I'm sure you remember Mr. Reyers. He started out as a defendant in this case, and ultimately ended up testifying as a witness...do you think that Robert Reyers and William Kane and...were all lying, members of the jury? Or do think they all told essentially the same thing about the heroin importation and Antonino Mannino's role and Simone Zito's role because that's in fact, what took place?"

The prosecutor continued,

> [Defense Counsel] in talking about William Kane, told you what a liar he was...but remember this; Reyers and Joseph Cuffaro thought he was such a liar that, based on his evidence against them, they pled guilty. And you heard Mr. Reyers, that he pled guilty. And you heard during the course of this trial that the evidence against Mr. Reyers came

primarily from William Kane.

Counsel for petitioners Varisco and Antonino Mannino objected, but the District Court overruled the objection. Counsel for Antonino Mannino later moved for a mistrial which the District Court denied, on the ground that the guilty pleas could not be used as evidence of Kane is veracity.

Petitioners contend that Reyers testimony, the prosecutor's summation, and the inadequate instructions of the Trial Court present significant questions of Law which should be reviewed by this Honorable Court. Competing values exist in this case and the court should render a decision on balancing the various values and on the appropriate standards to be applied in a determination. Specifically, this Court should review initially the propriety of permitting a co-defendant, who has sat the defense table for a substantial portion of the trial, being permitted to both enter a plea of guilty and testify in the same case against his co-defendants. Significantly, Reyers testimony could only have bolstered the testimony of William Kane in this case.

In ***United States v. Toner***, 173 F2nd 140 (3rd Circuit 1949), the court stated

> The foundation of the...policy [prohibiting evidence of a co-conspirators guilty plea] is the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else [Conviction] of an alleged fellow conspirator after trial [or guilty plea] is not admissible as against one now being charged.

See also, ***United States v. Miranda***, 593 F2nd 590, 594-96 (5th Circuit. 1979). The petitioners submit that the appropriate remedy here was to grant counsel's motion for a mistrial to prevent the jury from misusing Reyer's disappearance and the implication that he had pleaded guilty. In the absence of such a declaration, the jury was freed to infer petitioners guilt on the basis of Reyer's change of heart. This denied petitioners their right to due process of law. Research has not disclosed a single case decided in the United States Supreme Court in which the court approved of

the procedure whereby a co-defendant who plead guilty during trial has been permitted to testify as a prosecution witness at the same trial. Allowing the co-defendant to proceed in such a manner raises the specter that such a witness has revealed or will reveal defense secrets to the prosecution as part of any deal made with the government. Although defense counsel in this case weren't able to substantiate their belief that this had in fact occurred, clearly there was a diversion of the attention of all the parties on to this collateral matter. Petitioners believe that a "bright line" rule should be formulated by this honorable court prohibiting defendants who plead during a trial from becoming a witness for the prosecution at the same trial. This issue should be fully briefed and reviewed by the court.

Moreover, petitioners submit that the court's limiting instruction in this case was of no value to petitioners. This Honorable court has declared, in the past, that there are certain situations in which the legal fiction of a jury's obligation to follow instructions will simply be disregarded because the danger of prejudice simply over whelms the

notion that a jury will disregard substantially prejudicial matter. See ***Richardson v. Marsch***, 481, US 200 (1987).

Indeed, in the case of at bar, the lack of instruction when combined with the prosecutors use of Reyer's change of heart during a summation arise substantial questions as to the fairness of the procedures employed against the petitioners. For all of the foregoing reasons, this petition should be granted and this issue review.

CONCLUSION

This court should grant a petition for Certiorari because: first, the court should review the existing law on minimization and render a determination on whether minimization has any remaining Constitutional significance, should determine the significance of the "In furthance of the conspiracy" and its application in admitting evidence of statements made by co-conspirators, and should settle the law in the area determining the use of a co-conspirators testimony during a trial in which he is a defendant and during which he enters a plea of guilty.

Respectfully submitted,

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Appendix A—Opinion of the United States Court of Appeals for the Third Circuit, Filed March 4, 1991.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-2087, 89-2088, 89-2089,
89-2090 and 90-1034

UNITED STATES OF AMERICA

v.

FRANCESCO GAMBINO,
Appellant in No. 89-2087

IGNAZIO ANTONINO MANNINO,
Appellant in No. 89-2088

EMANUELE SALVATORE MANNINO,
Appellant in No. 89-2089

GRACE PULITANO MANNINO,
Appellant in No. 89-2090

ENZO VARISCO,
Appellant in No. 90-1034

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Nos. 89-00003-01, 89-00003-02,
89-00003-04, 89-00003-12 & 89-00003-08)

Argued September 17, 1990

Before: SCIRICA, ALDISERT and
HIGGINBOTHAM*, *Circuit Judges*

(Filed March 4, 1991)

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* Since the date of argument Judge Higginbotham has assumed senior status.

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OPINION OF THE COURT

SCIRICA, *Circuit Judge.*

Defendants appeal their jury convictions of conspiracy to import and distribute heroin (21 U.S.C. §§ 963, 846) and money laundering (18 U.S.C. § 1956(a)(1)). We will affirm.

I.

Francesco Gambino supervised the importation and distribution of heroin from Italy to the New York-New Jersey area from 1985 to 1988. The scheme was coordinated by Antonio ("Tony") Mannino and Simone Zito, with assistance from Tony Mannino's brother Salvatore ("Sal") Mannino, Tony Mannino's wife Grace Mannino, and Simone Zito's brother Stefano Zito. Enzo Varisco was one of the conspiracy's cocaine distributors.[1]

Before addressing defendants' contentions, it is necessary to recite the facts in some detail and in particular the background and role of William

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1. Francesco Gambino, Tony Mannino, Sal Mannino, and Grace Mannino were convicted of conspiring to import and distribute heroin (21 U.S.C. §§ 963, 846), Sal and Grace Mannino were convicted of money laundering (18 U.S.C. § 1956(a)(1)), and Enzo Varisco was convicted of conspiring to distribute cocaine (21 U.S.C. § 846).

Kane, an FBI informant and the government's most significant witness. Kane ran an illegal video poker business in New York City with Giuseppe "Joe" Gambino, and operated out of the Cafe Giardino in Brooklyn, owned by Joe Gambino. Through his illegal business, Kane became involved with the defendants in this case.

In October 1986, however, Kane became a confidential informant for the FBI. In 1986 and 1987, Kane was introduced to Simone Zito and Tony Mannino, and later to Simone Zito's brother, Stefano Zito. Stefano Zito and Kane became friends. In 1987, Stefano told Kane that he, his brother Simone Zito, and Tony Mannino were members of the Mafia and that they were importing heroin into the United States. Stefano told Kane that Tony's brother Sal Mannino was then in Sicily, arranging for an exchange of heroin for cocaine. FBI interceptions of telephone conversations confirmed that Sal Mannino was in Sicily at the time.

Working with the FBI, Kane began to participate in the conspirators' illegal activities. Because neither Simone nor Stefano Zito had any legitimate source of income, Kane carried them on the payroll of his video game company and arranged financing for their automobiles. Kane soon moved on to more direct involvement in the conspiracy.

In October, 1987, Simone Zito told Kane that he wanted to purchase a townhouse, as an investment and as a place to cut heroin, but that all his money was tied up in heroin. After first discussing a possible loan, Simone agreed, in a tape-recorded conversation, to sell Kane seven ounces of heroin for $25,000. That conversation also revealed some of the details of Simone Zito's relationship with Tony Mannino. Kane mentioned

that he did not want anyone to know about the transaction, not even Tony Mannino. Zito responded that "me and Tony's the same person."

Simone Zito delivered the heroin to Kane later that evening. The next day, Kane paid Simone Zito the $25,000. Tony Mannino accompanied Zito to that meeting, and afterwards Kane, Mannino and Zito discussed further heroin sales. In the course of these discussions, Kane mentioned that his boss in the drug trade was Joe Gambino. Mannino responded that his and Simone Zito's boss in the drug trade was Francesco Gambino.

On several other occasions, Simone Zito and Kane discussed further heroin transactions both in recorded and unrecorded conversations. In March or April 1988, the two had a conversation in the Cafe Giardino which significantly corroborated Mannino's earlier statement that he and Simone Zito worked for Francesco Gambino. Zito offered to sell Kane a kilogram of heroin on the spot. Kane, who was not able to purchase drugs without FBI authorization but did not want to seem disinterested, countered with a much lower offer. At that point, Simone Zito walked to the rear of the cafe, out of Kane's sight, then returned with the information that the price was negotiable, and that Kane could take a sample home to New Jersey. Shortly afterward, Kane determined that the only two people in the cafe, other than himself and Simone Zito, were Francesco Gambino and a bartender.

The government also presented evidence of the workings of the heroin importation scheme. Several members of the conspiracy who were indicted with defendants pled guilty and testified for the government. Salvatore Allegra testified that in 1985, he was asked by Tommaso Scalici to hire

couriers to smuggle heroin into the United States. Supervised by Simone Zito, Allegra arranged for couriers who travelled to the United States from Sicily with packages of heroin hidden on their bodies. In the United States, the heroin was delivered to Salvatore Caruso, an associate of Francesco Gambino. Allegra oversaw several deliveries before he was arrested by Italian authorities in 1986.

Tony Mannino and Simone Zito also sought Kane's assistance in their cocaine distribution scheme. Salvatore Rina, a friend of Kane's who lived in Florida, had access to large amounts of cocaine. Mannino and Zito wanted Kane's help in obtaining cocaine from Rina.[2]

Timothy Zepp, another FBI informant, also testified about the conspiracy's involvement in the cocaine trade. According to Zepp, Zito sold cocaine to Enzo Varisco. Zepp was one of Varisco's customers. On one occasion, Zepp arrived at Varisco's pizzeria to pick up a cocaine delivery. Because the cocaine had not yet arrived, Varisco told Zepp to wait. Soon Simone Zito arrived, carrying a bag. After Simone and Varisco went briefly to a back room, Varisco handed Zepp his cocaine. In a later conversation with Zepp, Simone Zito revealed that he knew the price Varisco charged for the cocaine, and offered Zepp a better price.

Grace Mannino, Tony Mannino's wife, was also involved. Because Tony Mannino knew that his telephone was being tapped, the conspirators devised an elaborate system of arranging for calls to and from various public pay telephones to conduct their drug trade. Typically a conspirator

2. The record does not reveal whether this contemplated transaction ever took place.

would call Grace Mannino and arrange for a telephone call to the "attorney's office" at a particular time. At the specified time, Simone Zito or Tony Mannino would be observed by government agents picking up a pay telephone.

Many of the telephone calls by conspirators to the Mannino residence were in halting, guarded code. For example, on January 5, 1988, Grace Mannino told Giovanni Angelo Mannino, Tony Mannino's brother, to call her husband Tony "at the same place as two days ago." Later that day, Simone Zito called the Mannino residence and told Sal Mannino to "call your brother . . . not at that place where you went two days ago . . . the one before . . . be careful at what you are doing." Calls that were not so cryptic explained when Tony Mannino would arrive in Brooklyn for his frequent meetings with Francesco Gambino.

The conspirators laundered their proceeds. In 1987, Tony Mannino, Sal Mannino, Grace Mannino, and Simone Zito purchased a house to shelter their drug profits. As we have noted, in October, 1987, Simone Zito told Kane that he needed money to buy a townhouse both as an investment and as a place to cut heroin. The day after Kane delivered the $25,000 to Simone Zito and Tony Mannino, $16,000 in cash was deposited in the bank account of SNT corporation, the corporate name of a pizzeria owned and operated by the Manninos. Like the money that Kane handed Simone, the deposit contained a large number of one hundred dollar bills. The government presented evidence at trial suggesting that the remaining $9,000 was paid into the account over the next several weeks.

Two other incidents corroborate Francesco Gambino's role in the conspiracy. As we have

noted, Kane helped Stefano and Simone Zito obtain automobiles. Kane made these arrangements through Robert Reyers, who was an automobile dealer in southern New Jersey. Through these transactions, Reyers became familiar with Stefano and Simone Zito, Tony Mannino, and Enzo Varisco. Reyers testified as a witness for the government at trial. In January, 1988, Robert Reyers told Kane, Simone Zito and Tony Mannino that Reyers' wife, a court reporter in the federal courthouse in Philadelphia, could obtain names that came before a federal grand jury sitting in the Eastern District of Pennsylvania. Soon afterwards, Simone Zito gave Reyers a list of four names, with instructions to contact him immediately if any of the names came up in connection with the grand jury. Those names were Simone Zito, Tony Mannino, Domenico Mannino, and Francesco Gambino.

The second incident was recounted by Simone Ricupa, a former heroin dealer in New York City. One day in 1985, Ricupa was told by his supplier, Sal DiMaggio, that DiMaggio's supplier needed as much money as possible to send to Italy as soon as possible. Ricupa gathered about $100,000 from some of his dealers, placed it in a paper bag and, as instructed, delivered the money to DiMaggio's restaurant. When he arrived at the restaurant, Ricupa saw Francesco Gambino sitting in a car parked near the restaurant. Ricupa and DiMaggio went into the restaurant and DiMaggio went to an apartment upstairs. While waiting, Ricupa could see Gambino from his vantage point in the restaurant. DiMaggio returned downstairs with two large shopping bags, which he carried out to Gambino's car. After a quick discussion with

Gambino, DiMaggio placed the bags in the car, and Gambino drove away.

On July 26, 1988, the FBI searched an apartment in Brooklyn, New York that was rented in the name of Salvatore Inzerillo. Prior to this search, Inzerillo, Simone Zito, and Tony Mannino had been seen going to and from the apartment. The search turned up a sample quantity of heroin and approximately $12,000 in cash. Reyers testified that after the search, Simone Zito said that if the search had taken place a day later "they would have caught us with four kilos of heroin."

As we have noted, following trial, Francesco Gambino, Tony Mannino, Sal Mannino, and Grace Mannino were convicted of conspiring to import and distribute heroin, Sal and Grace Mannino were convicted of money laundering, and Enzo Varisco was convicted of conspiring to distribute cocaine. The townhouse was forfeited to the United States government pursuant to 21 U.S.C. § 853.[3]

All of the defendants appeal on various grounds. For the reasons discussed below, we will affirm the district court.

II. Co-conspirator Hearsay

Kane's recounting of Tony Mannino's assertion that he and Simone Zito worked for Francesco Gambino was one of the most compelling pieces of evidence offered against Gambino. Federal Rule of Evidence 801(d)(2)(E) exempts from the hearsay rule "a statement by a coconspirator of a party during the course of and in furtherance of the

3. Francesco Gambino was sentenced to thirty years' imprisonment, Tony Mannino, 27 years' imprisonment, Sal Mannino, 18 years' imprisonment, Enzo Varisco, 15 years' imprisonment, and Grace Mannino, one year and one day in prison.

conspiracy." In determining whether the co-conspirator exception applies in a particular case, the trial court must determine, by a preponderance of the evidence, that there was a conspiracy between the declarant and the party against whom the evidence is offered; and that the hearsay statements sought to be admitted were made during the course of the conspiracy and in furtherance of its goals. *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987). Gambino contends that there was insufficient evidence of his participation in the conspiracy, and also that the hearsay statement should not have been admitted subject to later connection.

A.

Specifically, Gambino alleges that it was error for the district court to admit the hearsay statements prior to determining their admissibility. We begin with the observation that "the control of the order of proof at trial is a matter committed to the discretion of the trial judge." *United States v. Continental Group, Inc.*, 603 F.2d 444, 456 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); *see also United States v. Ammar*, 714 F.2d 238, 245-47 (3d Cir.) (upholding admission of co-conspirator statements subject to later connection), *cert. denied*, 464 U.S. 936 (1983); *In re Fine Paper Antitrust Litigation*, 685 F.2d 810, 820-21 (3d Cir. 1982) (holding that *Continental Group* permitted, but did not require, admission of co-conspirators' hearsay statements subject to later connection), *cert. denied*, 459 U.S. 1156 (1983). We review for abuse of discretion. *Ammar*, 714 F.2d at 247.[4]

4. We have not been able to find in the record a timely objection. Gambino did not object when the challenged statement was elicited from Kane at trial. On appeal, Gambino asserts that he objected to the statement in several pretrial

There is a danger that if hearsay statements of an alleged co-conspirator are admitted subject to later connection, the court may determine at the close of evidence that the offering party did not meet its burden of establishing a conspiracy and the jury would be irremediably prejudiced. Therefore we have counseled that the practice of admitting co-conspirator hearsay statements subject to later connection "be carefully considered and sparingly utilized by the district courts." *Continental Group*, 603 F.2d at 457.

At the same time, we have consistently recognized that "the order-of-proof problem confronting the trial judge is a particularly difficult one where the government is attempting to prove the participation of multiple defendants in a continuing conspiracy." *Id.* at 456 (quoting *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 195 (3d Cir. 1970) (upholding the district court's decision to admit co-conspirator statements subject to later connection)). In *Continental Group*, we upheld the district court's decision to admit co-conspirator hearsay subject to later connection because "given the large amount of interrelated testimony to be considered in this case, we believe that alternative approaches may have been unduly complex and confusing to the jury or to the court." *Id.* at 457. Similar difficulties confront the trial judge in many large-scale conspiracy cases.

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motions, and provides three citations to the record. We have examined his citations, but none of the cited materials raise this objection. Gambino also asserts that the defendants repeatedly requested findings on the admissibility of co-conspirator statements during trial, but offers no record citations. Therefore we could review this, and the other challenges to the admission of Kane's statement that he worked for Gambino, under a plain error standard.

This case is no exception. The government's proof consisted of a large amount of interrelated testimony. Except for Kane, most of the government's witnesses testified only to discrete corners of the conspiracy. Only Kane provided a common thread linking virtually all the conspiracy's actions. Therefore the conspiracy became clearly defined only after the testimony of several witnesses. For these reasons, we find that the district court's decision to admit the testimony subject to later connection was not an abuse of discretion.

B.

Gambino also contends that timing aside, the government did not adequately establish his connection to the conspiracy. As we have noted, the trial court must determine, by a preponderance of the evidence, whether the defendant and the declarant were members of the alleged conspiracy, and whether the hearsay statements were made during the course of the conspiracy and in furtherance of its goals. *Bourjaily*, 483 U.S. at 175-76 (1987). Before the adoption of Fed. R. Evid. 104(a), proof of a conspiracy required evidence external to the hearsay statement itself. This rule was premised on the belief that a statement should not be able to "lift itself by its own bootstraps to the level of competent evidence." *Glasser v. United States*, 315 U.S. 60, 75 (1942). *Bourjaily* made clear, however, that the adoption of Fed. R. Evid. 104(a) changed the earlier rule, and that the co-conspirator's hearsay statement could be used to establish the existence of a conspiracy.

In *Bourjaily*, the Court expressly declined to decide whether a trial court could rely "solely upon [the declarant's] hearsay statements to determine

that a conspiracy had been established by a preponderance of the evidence." *Bourjaily*, 483 U.S. at 181. Here there is sufficient evidence external to the hearsay statement itself, so we need not address that issue today.[5]

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5. We note that every United States court of appeals that has addressed this issue has required some independent evidence. The pre-*Bourjaily* requirement of proof *aliunde* was premised on the presumptive unreliability of co-conspirator hearsay. *See* 483 U.S. at 179; Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv. L. Rev. 1378, 1387 (1972) (coconspirator statements may suffer from "exclusively self-serving motives and possibly faulty memories"); Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 Mich. L. Rev. 1159, 1165-66 (1954) ("The conspirator's interest is likely to lie in misleading the listener into believing the conspiracy stronger with more members (and different members) and other aims than in fact it has.").

The Court did not alter that presumption, but held that the ways in which it could be rebutted had been expanded by the adoption of Fed. R. Evid. 104(a). "[A] piece of evidence, unreliable in isolation, may become quite probative *when corroborated by other evidence*. . . . [T]rial courts must be permitted to evaluate these statements for their evidentiary worth as revealed by the particular circumstances of the case." 483 U.S. at 180 (emphasis added). In the absence of any evidence to the contrary, however, the presumption of unreliability controls; and the hearsay statement cannot serve as the basis for establishing the declarant's connection to the conspiracy. *United States v. Garbett*, 867 F.2d 1132, 1134 (8th Cir. 1989) ("It is generally agreed that 'an otherwise inadmissible hearsay statement cannot provide the sole evidentiary support for its own admissibility.'") (quoting *Bourjaily*, 483 U.S. at 184 (Stevens, J., concurring)); *United States v. Silverman*, 861 F.2d 571, 577 (9th Cir. 1988) ("[A] co-conspirator's out-of-court statement, standing alone, is insufficient to establish that the defendant had knowledge of and participated in a particular conspiracy."); *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988) ("[T]here must be some evidence, aside from the proffered statements, of the

The district court assumed a need for some external evidence, and found that Gambino was a member of the conspiracy, and that the hearsay statement to Kane was made during the course of and in furtherance of that conspiracy. We review the district court's determination under a clearly erroneous standard. *United States v. Cruz*, 910 F.2d 1072, 1081 n.11 (3d Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 709 (1991).

The following independent evidence indicates that Gambino was involved in the conspiracy to import and distribute narcotics. First, there is the March, 1988 discussion in the Cafe Giardino between Kane and Simone Zito. After some bickering about the price of heroin, Simone Zito left for another area of the cafe, and upon returning Zito told Kane that the price was negotiable, and that he could have a sample of the heroin. Shortly thereafter, Kane observed that Francesco Gambino and a bartender were the only other people in the cafe. It was a permissible inference that Zito went to Gambino for authority to negotiate price.

Francesco Gambino was also strongly implicated through the compromise of confidential grand jury proceedings. Simone Zito provided Reyers with a list of four names, and asked Kane to inform him if any of the names were mentioned in grand jury proceedings. Gambino's name was on that list, along with the names of Simone Zito, Tony Mannino, and fugitive codefendant Domenico

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existence of the conspiracy and the defendant's involvement."); *United States v. Zambrana*, 841 F.2d 1320, 1344-45 (7th Cir. 1988) (observing that some independent evidence is necessary); *United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir.) (assuming that some independent evidence is necessary), *cert. denied*, 488 U.S. 821 (1988).

Mannino. It was a permissible inference that these individuals were linked in the drug trade.

Filippo Ricupa's testimony also tied Gambino to the conspiracy. In the 1985 money drop described in Part I, Gambino was in a car in front of the restaurant, and received the bags that DiMaggio brought downstairs. Furthermore, electronic surveillance revealed regular telephone calls between Gambino and Tony and Grace Mannino, many of which involved when Tony Mannino would arrive in Brooklyn for his frequent meetings with Gambino. When viewed in light of the other evidence they corroborate Gambino's involvement.

Finally, a series of FBI surveillance photographs showed Gambino in the presence of many of the co-conspirators, in particular Tony Mannino and Simone Zito, during "key periods of the conspiracy." *United States v. Gambino*, 728 F. Supp. 1150, 1155 (E.D. Pa. 1989). Mere association "cannot alone support a conviction for conspiracy. *United States v. Torres*, 519 F.2d 723, 725-26 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975). On the other hand, the timing and circumstances of a meeting or series of meetings may be sufficiently suspicious to permit a reasonable inference of complicity in the criminal enterprise." *United States v. Ammar*, 714 F.2d 238, 250 (3d Cir. 1983). In *Ammar*, we held that evidence of repeated meetings with other members of the conspiracy coinciding with heroin importations appropriately could be considered in determining whether the co-conspirator exception to the hearsay rule was applicable. Here, also, consideration of the photographs was appropriate.

To this evidence we now add the hearsay statement sought to be admitted. According to Kane, Tony Mannino directly asserted to Kane that

Gambino was Mannino's and Zito's boss in the drug trade. The district court, which heard the testimony, concluded that all of this evidence, taken together, established by a preponderance of the evidence Tony Mannino and Simone Zito's membership in a conspiracy with Gambino. This determination was not clearly erroneous.

III.

All of the defendants challenge the admission and use of several witnesses' guilty pleas.

A.

At trial, the government presented several witnesses who were co-conspirators and who had pled guilty. While on the stand, the government elicited testimony about their guilty pleas. Defendants contend that these references to the co-conspirators' guilt were prejudicial and deprived them of a fair trial.

Defendants did not object during the witnesses' testimony. Therefore, we review this matter under a plain error standard. *See* Fed. R. Evid. 103(a)(1) (requiring a "timely objection . . . stating the specific ground of objection, if the specific ground was not apparent from the context"); *United States v. Pungitore*, 910 F.2d 1084, 1125-26 (3d Cir. 1990) (reviewing for plain error statements to which defendants did not object), *petition for cert. filed*, Dec. 6, 1990 (No. 90-6472).[6] Under the plain

6. Some of the testimony was objected to on other grounds. For example, defendants objected to the admission of Zepp's guilty plea on the ground that Zepp's discussion of the plea agreement included a reference to the protection the government was providing him. That did not preserve the objection that is currently before us. *See, e.g., United States v. Field*, 875 F.2d 130, 134 (7th Cir. 1989) ("Neither a general objection to the evidence nor a specific objection on other grounds will preserve [an] issue on review.").

error standard (Fed. R. Crim. P. 52(b)), we can correct "only particularly egregious errors, those errors that seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Thame*, 846 F.2d 200, 204 (3d Cir.) (quoting *United States v. Young*, 470 U.S. 1 (1985)), *cert. denied*, 488 U.S. 928 (1988).

There are strong considerations against using a co-conspirator's guilt as substantive evidence of another defendant's guilt. "The foundation of [this] policy is the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else. . . . The defendant ha[s] a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." *Bisaccia v. Attorney General of New Jersey*, 623 F.2d 307, 312 (3d Cir.) (quoting *United States v. Toner*, 173 F.2d 140, 142 (3d Cir. 1949)), *cert. denied*, 449 U.S. 1042 (1980). In *Bisaccia*, a *habeas corpus* proceeding, we held that a prosecutor's use of a co-conspirator's guilty plea to establish another defendant's guilt was error, and remanded for a determination of whether the error was harmless.

This specter is not implicated when a guilty plea is introduced not to establish a co-conspirator's guilt, but for some valid purpose. For example, in *United States v. Inadi*, 790 F.2d 383, 384 n.2 (3d Cir. 1986), we upheld the admission of a co-conspirator's guilty plea "in order to rebut defense counsel's persistent attempts on cross-examination to raise an inference that the co-conspirators had not been prosecuted, and that Inadi was being singled out for prosecution."

In any criminal trial, the credibility of the prosecution's witnesses is central. By eliciting the witness' guilty plea on direct examination, the government dampens attacks on credibility, and forecloses any suggestion that it was concealing evidence. Such disclosure is appropriate. *See United States v. Casto*, 889 F.2d 562, 567 (5th Cir. 1989) ("Because it was reasonable for the prosecution here to believe that [defendant's] counsel would attempt to impeach [a testifying co-conspirator's] implicating testimony by questioning her about her guilty plea, it was also reasonable for the prosecutor to adduce this fact during her opening examination of [the testifying co-conspirator]."), *cert. denied*, __ U.S. __, 110 S. Ct. 1164 (1990); *United States v. Dworken*, 855 F.2d 12, 30 (1st Cir. 1988) ("[T]he fact of [a] guilty plea and the plea agreement properly may be elicited to dampen the effect of an anticipated attack on the witness' credibility."); *United States v. Louis*, 814 F.2d 852, 856 (2d Cir. 1987) ("Proper purposes [for co-conspirators' guilty pleas] include disclosure of matters damaging to the credibility of a witness and contradiction of any inference that the government is concealing a witness' bias."); *see also* 2 J. Weinstein & M. Berger, *Evidence* ¶ 410[07], at n. 3 (1990) (If a co-offender who appears as a witness has pled guilty, "the trier must know about the plea's existence in order to evaluate the witness' testimony."). In this case, the defendants began their attack on the credibility of the government's witnesses in their opening statements to the jury. Yet even in the absence of this attack, the elicited testimony was proper here.

At the same time, it is important that the jury understand the limited purposes of a

co-conspirator's guilty plea. Here, in its final charge, the district court properly instructed the jury that the guilt of any one person was not substantive evidence of the guilt of any other person. We also note that the guilty pleas were not emphasized by the prosecutor during direct examination, and were not inappropriately emphasized during closing argument. We believe that the appropriate uses of the pleas were clear. The references to the pleas were not an abuse of discretion, let alone plain error.

B.

Defendants level a special attack on the testimony of Robert Reyers. He started the trial as a defendant but pled guilty on the twelfth of twenty-six days of trial and became a witness for the prosecution. During the government's case in chief, Reyers corroborated some of Kane's testimony through his own recollection of events, and also testified that Kane had told him about many of the incidents Kane mentioned at trial.

Defendants timely objected to Reyers' testimony on the grounds that it would impermissibly suggest the guilt of the remaining defendants. We review the district court's decision to admit Reyers' testimony for abuse of discretion. *See United States v. Pungitore*, 910 F.2d 1084, 1151 (3d Cir. 1990), *petition for cert. filed*, Dec. 6, 1990 (No. 90-6472).[7]

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7. Defendants raise two further objections to Reyers' testimony. First, they contend that the district court should have declared a mistrial even before the jury was apprised of Reyers' plea during his testimony, because the mere fact of his disappearance strongly implied his guilt, and in turn implicated the other defendants. Any such inference was foreclosed by the court's clear instruction to the jurors,

As we have noted, guilty pleas are properly elicited on direct examination to dampen subsequent attacks on credibility, and to foreclose any suggestion that the party producing the witness was concealing evidence. That conclusion applies equally to Reyers' testimony. Reyers' relationships with the remaining defendants could have created the possibility for the prejudice that we warned of in *Bisaccia*. Here, the district court avoided those dangers. As we have noted, the district court properly instructed the jury on the appropriate uses of guilty pleas, and as with the guilty pleas of the other co-conspirators, Reyers' guilty plea was not emphasized by the prosecutor during direct examination, and was not inappropriately emphasized during closing argument. We believe that the appropriate uses of Reyers' plea were clear, and that the district court's decision to admit Reyers' testimony and to allow mention of his guilty plea was not an abuse of discretion.

This case is factually similar to *United States v. Kilrain*, 566 F.2d 979 (5th Cir. 1978), *cert. denied*, 439 U.S. 819 (1978). In that case, one of the defendants pled guilty in the middle of trial and became a government witness. The remaining defendants, who were convicted, contended that the defendant who pled guilty had been privy to their defense strategy, and therefore they were

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immediately after they entered the courtroom on the first day following Reyers' plea, that they were not to infer anything from Reyers' absence. At that point in the trial, we find no prejudice to the other defendants. Second, defendants contend that Reyers' testimony impermissibly bolstered Kane's credibility as a witness, because the jury might infer that Kane's testimony was one of the reasons Reyers pled guilty. We deal with this objection below.

deprived of a fair trial. The Court of Appeals for the Fifth Circuit upheld the convictions, observing that the remaining defendants needed to demonstrate some "actual prejudice resulting from [the witness'] supposed knowledge of defense strategy, or that [the witness] communicated such knowledge to the government." 566 F.2d at 983. In this case, defendants have not alleged any specific prejudice. Although the Sixth Amendment claim raised in *Kilrain* is different than the claim raised here, *Kilrain* lends support to our result today.

C.

Defendants also object to remarks made by the prosecution during closing arguments. Before discussing the challenged remarks, we must place them in context. A central focus of defendants' closing arguments – indeed much of their defense at trial – was Kane's lack of credibility. Counsel for Tony Mannino argued that "William Kane, as [the prosecution] knew before they put him on the stand, is a perjurer. Simple. He's got a history of it. . . . He told you he's a gangster, he's a wiseguy, he's a thug who goes around threatening people with a gun. . . . You decide: murderer or liar? Either way, his testimony isn't worth anything. William Kane is a cold, calculating individual who came here and lied even as we sat . . . ."

Even more telling, counsel for defendant Fodera, who was acquitted by the jury, pointedly made an issue of Reyers' lack of belief in Kane. In his closing argument, he remarked:

> This case is unique in the trials of criminal cases in that this is one of the rare instances that you

> will ever see where you will see one of the government witnesses get on the stand and say to you, as happened in this case, that another one is a liar and a perjurer. Do you remember Reyers, the fellow who used to sit in that corner over there, who pled guilty and became a government witness? Reyers testified in connection with this case, and Reyers, one of the things that he said is that Kane, when he testified in this court, lied. So, you have one witness characterizing another government witness as a perjurer.

The reference is to testimony by Reyers, elicited during cross-examination, recalling a conversation that Reyers had with Gambino's attorney before Reyers pled guilty. Reyers had told Gambino's attorney that he believed that Kane was lying on the stand. Later in his closing, counsel for Fodera again sounded this refrain:

> And Mr. Reyers, who was one of [the prosecution's] witnesses . . . said [Kane] lied on the witness stand and he was a liar, and I accuse [Kane] of being a murderer and I accuse him of being a perjurer, and I submit to you that it is not fair, it is not just, to try to convict [Fodera] solely on the testimony of a murderer, a perjurer, a robber, a burglar, a career criminal.

After these remarks, the prosecution, in its rebuttal remarks to the jury, suggested that Reyers' guilty plea belied his asserted lack of faith in the veracity of Kane's testimony.

> Now [Counsel for Tony Mannino], in talking about William Kane, told you what a liar he was, and other attorneys have. But remember this: Reyers and Joseph Cuffaro thought that he was

such a liar that, based on his evidence against them, they pled guilty. . . . You heard Mr. Cuffaro testify that, as the result of the sale of 15 kilograms of cocaine in Florida, he was indicted, and the sale was to Bill Kane. He was indicted and he pled guilty. And you heard Mr. Reyers, that he pled guilty, and you heard during the course of this trial that the evidence against Mr. Reyers came primarily from William Kane.

Defendants timely objected to the prosecution's statements, and now contend that the reference to Reyers' and Cuffaro's guilty pleas deprived them of a fair trial. We review the district court's denial of a motion for a mistrial on these grounds for abuse of discretion. *See United States v. DiLoreto*, 888 F.2d 996 (3d Cir. 1989). We will reverse if "the prosecutor's remarks, taken in context of the trial as a whole, were sufficiently prejudicial to have deprived [defendants of their] right to a fair trial." *United States v. DiPasquale*, 740 F.2d 1282, 1297 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985).

Defendants raise two related arguments. First, they contend that the fact of Reyers' and Cuffaro's guilty pleas cannot appropriately be used to bolster Kane's credibility by suggesting that they, at least, believed Kane. Second, they argue that even if the prior guilty pleas are relevant, mentioning them warrants a mistrial because it suggests that the remaining defendants are guilty merely by virtue of their association with those who pled guilty.

At the outset, we note that the comments by the prosecutor were proper as a fair and invited response to the defendants' vehement attacks on Kane's credibility. "[P]rosecutorial comment must be examined in context." *United States v. Robinson*,

485 U.S. 25, 33 (1988). In *Robinson*, defendant's attorney had argued that the government had unfairly deprived his client, who did not testify at trial, of an opportunity to explain his actions. In his closing argument, the prosecutor commented that the defendant had the opportunity to take the stand and testify if he so desired. Defendant claimed that this reference deprived him of his right to be free from compulsory self-incrimination under the Fifth Amendment and under 18 U.S.C. § 3481 (1988). The Court rejected this claim, reasoning that the comments were a fair response to defendant's attacks. Similarly, in *United States v. Pungitore*, 910 F.2d 1084, 1120-27 (3d Cir. 1990), *petition for cert. filed*, Dec. 6, 1990 (No. 90-6472), we held that a prosecutor's summation reference to his oath of office was a proper response to a closing argument attack on the integrity of the prosecution that ranged beyond any evidence adduced at trial. *See also United States v. Arnold*, 890 F.2d 825, 830 (6th Cir. 1989) (prosecutor's mention of codefendants' guilty pleas in closing argument appropriate rehabilitation of a witness' credibility); *United States ex rel. Paxos v. Rundle*, 491 F.2d 447, 453 (3d Cir. 1974) ("'counsel does have the right to reply to an argument raised by his opposing advocate'") (quoting *United States v. Casteel*, 476 F.2d 152, 155 (10th Cir. 1973)).

The reference to Reyers' guilty plea was appropriate as a direct response to a specific argument made by the defense. *See United States v. Sanchez*, 790 F.2d 1561 (11th Cir. 1986). In *Sanchez*, defendant was convicted of money laundering. He was involved in several transactions with an investment firm established by the DEA for the purpose of investigating the

laundering of drug proceeds. Defendant attacked, on cross-examination, one of the prosecution witness' "suitability for federal investigative work." 790 F.2d at 1564. The Court of Appeals for the Eleventh Circuit upheld the admission of testimony by a DEA agent that the witness had been found reliable in other investigations, because the testimony was a direct response to the defendant's attack. *See also* Fed. R. Evid. 608; McCormick, *Evidence* § 49 (3d ed. 1984).

We note that at least one other United States Court of Appeals has found guilty pleas relevant and admissible evidence of a witness' veracity when invoked as a direct response to a specific attack. In *United States v. Martinez*, 775 F.2d 31, 36-38 (2d Cir. 1985), much of the prosecution's case turned on the testimony of one witness, who like the defendant was an inmate in a state prison. The defendant pointed out that the witness had accused other inmates and guards of committing crimes, suggesting that the witness had fabricated these accusations to curry favor with the prison administration and to procure an early release. The prosecution rejoined with testimony establishing that all of the guards accused by the witness had pled guilty. The Court of Appeals for the Second Circuit approved, holding that admission of these other guilty pleas was not an abuse of discretion. *Id.* at 38. *Cf. United States v. Lochmondy*, 890 F.2d 817, 820-22 (6th Cir. 1989) (upholding a conviction when the government had, during closing, observed that one of the prosecution's witnesses had testified in other cases that resulted in convictions); *Arnold*, 890 F.2d at 830.

In this case, defendants made an issue of Reyers' belief in Kane in closing arguments. The

reference to Reyers' plea on rebuttal was an appropriate response. Defendants never specifically made an issue of Cuffaro's belief in Kane, so we find the reference to Cuffaro's plea more troubling. Even if we were to find that this was error, however, it would be harmless, because Cuffaro did not play a central role in either the conspiracy or the government's case at trial. In contrast, the issue of Kane's credibility was constantly revisited, by all parties, throughout the twenty-six day trial. Cuffaro's guilty plea was in an unrelated proceeding, and the role Kane's testimony played in that plea was, and remains, unclear. The one reference to Cuffaro's plea was not, when "taken in context of the trial as a whole, sufficiently prejudicial to have deprived [defendants of their] right to a fair trial." *United States v. DiPasquale*, 740 F.2d 1282, 1297 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985).

It is significant that the challenged statements left undisturbed the jury's prerogative to decide all questions of credibility. If there was any ambiguity, it was cleared up in the district court's instructions, in its final charge, that evaluating the credibility of witnesses was the function of the jury. *Cf. United States v. Hilton*, 772 F.2d 783, 786 (11th Cir. 1985) ("When bolstering testimony suggests to the jury that a witness bears the responsibility for determining the truth of the evidence, admission of the testimony may constitute reversible error.") (citing *United States v. Price*, 722 F.2d 88, 90 (5th Cir. 1983)); *United States v. Murray*, 445 F.2d 1171, 1176 n.7 (3d Cir. 1971); *United States v. DiLoreto*, 888 F.2d 996, 999 (3d Cir. 1989) (prosecutorial vouching for the credibility of a witness improper).

Even if otherwise appropriate, the challenged references to guilty pleas could still constitute

reversible error if used as substantive evidence of the defendants' guilt. As we have noted, such use poses the threat that a defendant will be found guilty not on the basis of evidence against him, but on the basis of a shadow cast by cases against others. *Bisaccia v. Attorney General of New Jersey*, 623 F.2d 307, 312-13 (3d Cir.) (quoting *United States v. Toner*, 173 F.2d 140, 142 (3d Cir. 1949)), *cert. denied*, 449 U.S. 1042 (1980). Therefore we must determine whether the appropriate use of the references was sufficiently clear.

As we have noted, there was a direct nexus between Reyers' plea and the attacks on Kane's credibility. This nexus made clear that the pleas were not offered as substantive evidence of the defendants' guilt. Cuffaro's plea, also, was mentioned in response to attacks on Kane's credibility. The connection to Kane's credibility was far less direct, and therefore the purpose less clear. As we have mentioned, however, he was not centrally involved in the conspiracy in this case. His guilty plea was entered in a different proceeding, and when he described his plea to the jury he mentioned only that he had purchased cocaine from Kane, and did not mention any of the defendants. Recalling this testimony in closing argument did not imply that any of the defendants were guilty of the offenses charged in this case. Finally, any possible misunderstanding of the appropriate use of the guilty pleas was cleared up by the district court's jury instructions. The court explicitly told the jury that the guilt of any person was not evidence of any other person's guilt. Defendants did not object to this charge. We view this as adequate, because under Fed. R. Crim. P. 30, "[i]f a more specific curative instruction were thought necessary, counsel should have requested

one before the jury retired." *United States v. Thame*, 846 F.2d 200, 204 (3d Cir.), *cert. denied*, 488 U.S. 928 (1988).

For these reasons, the prosecutor's remarks did not deprive defendants of a fair trial, and the district court's denial of defendants' motion for a mistrial on this ground was not an abuse of discretion.

IV.

Defendants raise several other grounds for appeal. First, they challenge the sufficiency of the evidence supporting their convictions and the forfeiture of the house. We have reviewed the record, and find those arguments without merit. *See Burks v. United States*, 437 U.S. 1, 16 (1978); *United States v. Pungitore*, 910 F.2d 1084, 1128-29 (3d Cir. 1990), *petition for cert. filed*, Dec. 6, 1990 (No. 90-6472).

Defendants also claim that the district court improperly admitted Kane's hearsay testimony recounting matters about the conspiracy told him by Stefano Zito. Those statements were admitted under the co-conspirator exception we have already discussed. Defendants contend there was insufficient evidence establishing Stefano Zito's membership in the conspiracy; and that the statements were not in furtherance of the conspiracy. We disagree, and find those contentions without merit.

Defendants raise several other claims. They contend that: the district court's instructions to the jury were flawed; the prosecutors created or altered certain critical documents; the prosecutors improperly referred to charges pending against Simone Zito and Tony Mannino in Italy during trial; defendants were prejudiced by the handing

down of a superseding indictment six weeks prior to trial; the government failed adequately to minimize intercepted communications; the jury had available during its deliberations prejudicial tapes that had not been admitted into evidence; and the district court erroneously failed to quash a superseding indictment or order the government to provide a bill of particulars. We have considered each of these arguments and find them without merit.

For the foregoing reasons, we will affirm the judgments of sentence.

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for the Third Circuit

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Nos. 91-199 and 91-439

In the Supreme Court of the United States

OCTOBER TERM, 1991

FRANCESCO GAMBINO, PETITIONER

v.

UNITED STATES OF AMERICA

IGNAZIO ANTONINO MANNINO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court may conditionally admit co-conspirator declarations subject to a determination at the close of the evidence that the government has satisfied the requirements of Federal Rule of Evidence 801(d)(2)(E).

2. Whether a mistrial should have been declared after one of the defendants changed his plea to guilty in the middle of petitioners' trial, and, if not, whether that defendant should have been barred from testifying for the government.

3. Whether the government made improper use, during closing argument, of the guilty pleas of a defendant and another testifying co-conspirator.

4. Whether federal agents conducting electronic surveillance failed to minimize the interception of conversations as required by 18 U.S.C. 2518(5).

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-199

FRANCESCO GAMBINO, PETITIONER

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 43a-104a,[1] is reported at 926 F.2d 1355. The opinion of the

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[1] "Pet. App." refers to the appendix to the petition in No. 91-199.

district court, Pet. App. 1a-42a, is reported at 728 F. Supp. 1150.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1991. Pet. App. 43a-104a. On May 17, 1991, Justice Souter extended the time for filing a petition for a writ of certiorari to July 22, 1991. On July 9, 1991, Justice Souter further extended the time for filing a petition for a writ of certiorari to August 1, 1991. The petition in No. 91-199 was filed on that date.

On June 6, 1991, Justice Souter denied a request by the petitioners in No. 91-439 for an extension of time to file a petition for a writ of certiorari. The petition in No. 91-439 was not filed until September 13, 1991, and is therefore substantially out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners Francesco Gambino, Ignazio Antonino (Tony) Mannino, and Emannuele Salvatore (Sal) Mannino were convicted of conspiring to import heroin, in violation of 21 U.S.C. 963, and conspiring to distribute heroin, in violation of 21 U.S.C. 846. Sal Mannino was also convicted of money laundering, in violation of 18 U.S.C. 1956(a)(1). Petitioner Enzo Varisco was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846. The district court sentenced Gambino to a total of 30 years' imprisonment, to be followed by five years' supervised release, and ordered him to pay a $50,000 fine. C.A. App. 653-656. The court sentenced Tony Mannino to a total of 27 years' imprisonment, to be followed by five years' supervised release, and

ordered him to pay a $25,000 fine. C.A. Supp. App. 113-117. The court sentenced Sal Mannino to a total of 18 years' imprisonment, to be followed by five years' supervised release, and ordered him to pay a $25,000 fine. C.A. Supp. App. 118-122. The court sentenced Enzo Varisco to 15 years' imprisonment, to be followed by five years' supervised release, and ordered him to pay a fine of $10,000. C.A. Supp. App. 123-127. The court of appeals affirmed. Pet. App. 43a-104a.

1. The evidence at trial showed that petitioner Francesco Gambino supervised the importation and distribution of heroin in the New York-New Jersey area from 1985 to 1988. The scheme was coordinated by petitioner Tony Mannino and Simone Zito, with assistance from Tony Mannino's brother petitioner Sal Mannino, Tony Mannino's wife Grace Mannino, and Simone Zito's brother Stefano Zito. Petitioner Enzo Varisco was one of the conspiracy's cocaine distributors.[2] Pet. App. 44a.

William Kane, an FBI informant and the government's principal witness at trial, ran an illegal video poker business in New York City with Giuseppe "Joe" Gambino. Kane operated the business out of the Cafe Giardina in Brooklyn, which was owned by Joe Gambino. Through his illegal gambling business, Kane gained first-hand knowledge of the conspiracy in this case. Pet. App. 45a.

In October 1986, Kane became a confidential informant for the FBI. In 1986 and 1987, Kane was introduced to Simone Zito and Tony Mannino, and later to Simone Zito's brother, Stefano Zito. Stefano

[2] Co-defendants Simone and Stefano Zito were fugitives at the time of trial. Co-defendant Grace Mannino was tried and convicted with petitioners.

Zito and Kane became friends. In 1987, Stefano told Kane that he, his brother Simone Zito, and Tony Mannino were members of the Sicilian Mafia and that they were importing heroin into the United States. Stefano told Kane that Tony's brother Sal Mannino was in Sicily at that time, arranging an exchange of heroin for cocaine. FBI interceptions of telephone conversations confirmed that Sal Mannino was in Sicily at the time. Pet. App. 45a-46a.

Under FBI supervision, Kane began to participate in the conspirators' illegal activities. Since neither Simone nor Stefano Zito had any legal source of income, Kane carried them on the payroll of his video poker company. Kane also arranged financing for their automobiles. Pet. App. 46a.

In October 1987, Kane became directly involved in the conspiracy. In that month, Simone Zito told Kane that Simone wanted to purchase a townhouse, as an investment and as a place to cut heroin, but that all his money was tied up in heroin. After first discussing a possible loan, Simone agreed, in a tape-recorded conversation, to sell Kane seven ounces of heroin for $25,000. That conversation also revealed some of the details of Simone Zito's relationship with Tony Mannino. Kane mentioned that he did not want anyone to know about the transaction, not even Tony Mannino. Simone replied that "me and Tony's the same person." Pet. App. 47a.

Simone Zito delivered the heroin to Kane later that evening. The next day, Kane paid Simone Zito $25,000. Tony Mannino accompanied Simone to the meeting at which the payment was made. After the money was transferred, Kane, Mannino, and Simone discussed further heroin sales. In the course of subsequent discussions, Kane mentioned that his boss was Joe Gambino. Mannino responded that he and

Simone Zito were supervised by Francesco Gambino. Pet. App. 47a-48a.

On several other occasions, Kane and Simone Zito discussed heroin transactions in both recorded and unrecorded conversations. In March or April 1988, the two had a conversation in the Cafe Giardina that corroborated Mannino's earlier statement that he and Simone Zito worked for Francesco Gambino. Simone offered to sell Kane a kilogram of heroin on the spot. Kane could not purchase drugs without FBI authorization, but since he did not want to seem uninterested, he countered with a much lower offer. Simone then walked to the rear of the restaurant, out of Kane's sight. He returned with the information that the price was negotiable and that Kane could take a sample home to New Jersey. Shortly thereafter, Kane determined that the only people in the restaurant, other than himself and Simone Zito, were Francesco Gambino and a bartender. Pet. App. 48a-49a.

The government also presented evidence of the workings of the heroin importation scheme. Several members of the conspiracy who were indicted with petitioners pleaded guilty and testified for the government. One co-conspirator, Salvatore Allegra, testified that in 1985 he was asked by Tommaso Scalici to hire couriers to smuggle heroin into the United States. Supervised by Simone Zito, Allegra arranged for couriers to travel to the United States from Sicily with packages of heroin hidden on their bodies. In the United States, the heroin was delivered to Salvatore Caruso, an associate of Francesco Gambino's. Allegra oversaw several deliveries before he was arrested by Italian authorities in 1986. Pet. App. 49a-50a.

Two other incidents corroborated petitioners' role in the conspiracy. Kane helped Stefano and Simone Zito obtain automobiles. Kane made those arrangements through Robert Reyers, who owned an automobile dealership in southern New Jersey. Through those transactions, Reyers became familiar with Stefano and Simone Zito, Tony Mannino, and Enzo Varisco. Reyers testified as a witness for the government at trial. In January 1988, Reyers told Kane, Simone Zito, and Tony Mannino that Reyers' wife, a court reporter in the federal courthouse in Philadelphia, could obtain names that were referred to in proceedings before a federal grand jury sitting in the Eastern District of Pennsylvania. Soon afterwards, Simone Zito gave Reyers a list of four names, with instructions to contact him immediately if any of the names came up before the grand jury. Those names included Simone Zito, Tony Mannino, Domenico Mannino, and Francesco Gambino. Pet. App. 54a-56a.

The second incident was recounted by Simone Ricupa, a former heroin dealer in New York City. One day in 1985, Ricupa learned from his supplier, Sal DiMaggio, that DiMaggio's source of heroin wanted him to send a large amount of money to Italy as soon as possible. Ricupa gathered about $100,000 from some of his dealers, placed it in a paper bag and, as instructed, delivered the money to DiMaggio's restaurant. When he arrived at the restaurant, Ricupa saw Francesco Gambino sitting in a car parked near the restaurant. Ricupa and DiMaggio went into the restaurant, and DiMaggio went to an apartment upstairs. While he was waiting, Ricupa could see Gambino from the restaurant. DiMaggio returned downstairs with two large shopping bags, which he carried out to Gambino's car. After a quick discussion with Gambino, DiMaggio placed the bags

in the car, and Gambino drove away. Pet. App. 56a-57a.

2. a. The court of appeals affirmed petitioners' convictions. In response to Gambino's claim that the district court erred when it conditionally admitted out-of-court declarations prior to determining their admissibility, the court of appeals observed that "'the control of the order of proof at trial is a matter committed to the discretion of the trial judge.'" Pet. App. 60a. "[W]e have consistently recognized," the court noted, "that 'the order-of-proof problem confronting the trial judge is a particularly difficult one where the government is attempting to prove the participation of multiple defendants in a continuing conspiracy.'" *Id.* at 63a.

The court of appeals observed that the interrelated testimony in this case illustrates the impracticality of a requirement that the admissibility of co-conspirator declarations always be determined prior to the introduction of the declarations. The court explained that "[e]xcept for Kane, most of the government's witnesses testified only to discrete corners of the conspiracy. Only Kane provided a common thread linking virtually all the conspiracy's actions. Therefore the conspiracy became clearly defined only after the testimony of several witnesses." Pet. App. 64a-65a. The court held that the district court's decision to admit the testimony subject to later connection avoided unnecessary complexity and jury confusion, and was not an abuse of discretion.[3]

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[3] The court of appeals noted that Gambino did not timely object to Kane's testimony on the ground that the district court had not determined whether it was admissible. The court of appeals therefore concluded that it could review that challenge only for plain error. Pet. App. 61a-62a n.4. In addition, the court of appeals summarily dismissed the contention raised

b. The court of appeals also rejected petitioners' contention that the prosecution misused the guilty pleas of co-conspirator witnesses, and in particular that of Robert Reyers. Reyers started the trial as a defendant but changed his plea to guilty on the 12th day of the 26-day trial. Reyers then testified, during the government's case-in-chief, that some of Kane's testimony agreed with his own recollection of events and that Kane had told him about many of the incidents Kane mentioned at trial. Pet. App. 81a.

The court of appeals observed that guilty pleas are properly elicited on direct examination to dampen subsequent attacks on credibility and to foreclose any suggestion that the party producing the witness is concealing evidence. The court found that the government's introduction of Reyers' guilty plea, as well as those of other cooperating witnesses, was permissible on that basis. The court further found that the district court properly instructed the jury on the appropriate uses of guilty pleas, and that as with the guilty pleas of the other co-conspirators, Reyers' guilty plea was not inappropriately emphasized by the prosecution. Pet. App. 83a-84a.

The court of appeals also rejected petitioners' claim that remarks made by the prosecution during closing arguments required a new trial. The court observed that a central focus of petitioners' closing arguments and much of their defense at trial was Kane's alleged lack of credibility. Petitioners' counsel had vigorously attacked Kane in their closing arguments, having elicited that Reyers, while still a defendant, had commented to Gambino's counsel that Kane was a liar. Counsel for Tony Mannino argued that "[the

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by Tony Mannino and others that Stefano Zito's statements were not in furtherance of the conspiracy. *Id.* at 103a.

prosecution] knew before they put him on the stand" that Kane was "a perjurer." Pet. App. 86a-88a. Counsel for Gambino accused a prosecutor of cajoling Kane during a lunch break to alter his testimony. Tr. 4396. After those remarks, the prosecution, in its rebuttal argument to the jury, suggested that Reyers' guilty plea belied his asserted lack of faith in the veracity of Kane's testimony.

> Now [Counsel for Tony Mannino], in talking about William Kane, told you what a liar he was, and other attorneys have. But remember this: Reyers and Joseph Cuffaro thought that he was such a liar that, based on his evidence against them, they pled guilty. * * * You heard Mr. Cuffaro testify that, as the result of the sale of 15 kilograms of cocaine in Florida, he was indicted, and the sale was to Bill Kane. He was indicted and he pled guilty. And you heard Mr. Reyers, that he pled guilty, and you heard during the course of this trial that the evidence against Mr. Reyers came primarily from William Kane.

Pet. App. 89a.

The court of appeals found the prosecution's remarks to be "proper as a fair and invited response to the defendant's vehement attacks on Kane's credibility." Pet. App. 91a. The court found it significant that "the challenged statements left undisturbed the jury's prerogative to decide all questions of credibility. If there was any ambiguity, it was cleared up in the district court's instructions, in its final charge, that evaluating the credibility of witnesses was the function of the jury." Pet. App. 97a-98a.

The court of appeals noted that a prosecutor's references to guilty pleas would constitute reversible error if used as substantive evidence of a defendant's

guilt. But the court found a direct nexus between Reyers' plea and the attacks on Kane's credibility, and concluded that, as a result, the prosecutor's reference to Reyers' plea did not invite the jury to use the plea as substantive evidence of petitioners' guilt. Finally, the court noted, any possible misunderstanding of the appropriate use of the guilty pleas was removed by the district court's instruction to the jury that the guilt of any person was not evidence of any other person's guilt. Pet. App. 99a-101a.

c. The court of appeals summarily dismissed the claim by Tony Mannino and others that the government had failed adequately to minimize the interception of communications overheard as a result of court-authorized electronic surveillance. Pet. App. 104a.

ARGUMENT

1. Petitioners contend that the district court erred in admitting co-conspirator declarations at trial. Petitioner Gambino insists (91-199 Pet. 9-23) that it was improper for the court to admit the declarations before ruling them admissible. Petitioners Tony Mannino et al. maintain (91-439 Pet. 27) that Stefano Zito's statements were inadmissible because they were not made in furtherance of the conspiracy.

a. Federal Rule of Evidence 801(d)(2)(E) excludes from the definition of hearsay "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Such statements are admissible upon a showing that the declarant and the party against whom the statement is offered were members of the conspiracy, and that the statement was made during the course of and in furtherance of a conspiracy. See *Bourjaily* v. *United States*, 483 U.S. 171, 175 (1987).

Gambino states that the district judge did not find that the requirements of Rule 801(d)(2)(E) had been met until "*after the jury had rendered its verdict.*" Pet. 10 (emphasis in original); see also Pet. i. In fact, the district judge made the findings required by the Rule at the conclusion of the government's case and before the matter went to the jury. See Tr. 4105-4109 (detailed findings by district court on admissibility of co-conspirator declarations). The question presented is therefore whether the district court erred in deferring a determination of the admissibility of the co-conspirator declarations until after the close of the government's case-in-chief.

The courts of appeals have unanimously rejected Gambino's contention that district courts should be barred from conditionally admitting co-conspirator declarations. Instead, they have held that district courts have discretion to admit statements of conspirators subject to a later determination that the defendant against whom the evidence was offered is a member of the charged conspiracy. See, *e.g.*, *United States* v. *Mobile Materials, Inc.*, 881 F.2d 866, 869 (10th Cir. 1989), cert. denied, 493 U.S. 1043 (1990); *United States* v. *Andrus*, 775 F.2d 825, 837 (7th Cir. 1985); *United States* v. *Haimowitz*, 725 F.2d 1561, 1575 (11th Cir.), cert. denied, 469 U.S. 1072 (1984); *United States* v. *Kimble*, 719 F.2d 1253, 1257 (5th Cir. 1983), cert. denied, 464 U.S. 1073 (1984); *United States* v. *Perez*, 658 F.2d 654, 658-659 (9th Cir. 1981); *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 456 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); *United States* v. *Nelson*, 603 F.2d 42, 44-45 (8th Cir. 1979); *United States* v.

Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970).[4]

Requiring a pretrial hearing in every case would have significant disadvantages, and the present case illustrates them well. A pretrial hearing would have been nothing short of "a mini-trial, significantly prolonging the proceedings in the case and affording the defendants a complete preview of the government's evidence." *United States* v. *Ianniello*, 621 F. Supp. 1455, 1478 (S.D.N.Y. 1985), aff'd, 808 F.2d 184 (2d Cir. 1986), cert. denied, 483 U.S. 1006 (1987). On the other side of the scale, Gambino suffered no prejudice, because the district court held all of the co-conspirator declarations to be admissible. Although Gambino suggests that a district court will be hesitant to reverse the conditional admission of co-conspirator declarations (91-199 Pet. 13-17, 22), that suggestion presupposes

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[4] None of the cases cited by petitioner (91-199 Pet. 12-13) conflicts with the above decisions. See *United States* v. *Ferra*, 900 F.2d 1057, 1059 (7th Cir. 1990) (expressing preference for the entry of *Bourjaily* findings prior to admission of co-conspirator statements, but expressly recognizing that "we have approved admission subject-to-connection" of co-conspirator declarations); *United States* v. *Hernandez*, 829 F.2d 988, 994 (10th Cir. 1987) (recognizing that "the trial court was justified in provisionally admitting the co-conspirator statements subject to being connected up"), cert. denied, 485 U.S. 1013 (1988); *United States* v. *Troutman*, 814 F.2d 1428, 1447-1448 (10th Cir. 1987) (recognizing that "the district court [may] admit the [co-conspirator] statements provisionally, subject to being 'connected up' by subsequent independent evidence"); *United States* v. *Miliet*, 804 F.2d 853, 857 n.2 (5th Cir. 1986) (recognizing that district court may make final determination as to satisfaction of Rule 801(d)(2)(E) "at the conclusion of the evidence"); *United States* v. *Holloway*, 731 F.2d 378, 381 (6th Cir. 1984) (recognizing that "the judge may admit the hearsay statements subject to later demonstration of their admissibility by a preponderance of the evidence").

that the only remedy in the case of a finding that some or all of the declarations are inadmissible is a new trial for all the defendants. If the district court had determined that certain co-conspirator declarations were inadmissible, the court could have either given a limiting instruction or entered a mistrial as to Gambino, and it could have continued the trial against the remaining defendants. In any event, the court of appeals agreed with the district court in this case that independent evidence proved that Gambino was a member of the conspiracy and that the statements in issue were made in furtherance of that conspiracy. Pet. App. 69a-73a.

b. Tony Mannino et al. contend that Stefano Zito's statements were "mere narratives of past events and did not further any goal of the conspiracy." 91-439 Pet. 27. Contrary to petitioners' contention, Stefano Zito was a member of the conspiracy, and his statements reflected his participation. For example, after Simone Zito fled in the Spring of 1988, Stefano Zito attempted to collect a heroin debt. Stefano told Reyers that "I know the guy owes us the money because I delivered [four kilograms of heroin] to him." Tr. 3380-3381. In 1987, Stefano told Kane that he had taken one of the heroin couriers to Florida as a reward for successfully smuggling in the heroin that had been exchanged for cocaine. Tr. 1428-1429. Stefano's trip to Florida was confirmed by electronic surveillance. GX 256. Stefano Zito was an active member of the importation conspiracy, and his conversations with his co-conspirators about his activities were essential to the continued functioning of the conspiracy and the allocation of responsibilities within it. Zito's statements were therefore in furtherance of the conspiracy and were admissible

under Federal Rule of Evidence 801(d)(2)(E). See Gov't C.A. Br. 35-38.

2. a. Petitioners contend (91-199 Pet. 28-29; 91-439 Pet. 33) that an immediate mistrial should have been declared after Robert Reyers changed his plea to guilty during the course of the trial and left the defense table. They cite no authority to support the claim that such a drastic remedy was required. Petitioners also claim (91-199 Pet. 30-32; 91-439 Pet. 32) that the district court's instruction that the jury "draw no conclusions" (Tr. 2105) from the fact that Reyers was no longer a defendant was insufficient to prevent the jury from speculating about the reasons for Reyers' disappearance. Yet no defendant objected or asked for a more detailed instruction, and the failure of the district court to give one surely does not amount to plain error. The jury was adequately instructed at the end of the case that "the fact that [others] have been found guilty of ~~those~~ offenses is not evidence that any of these defendants are guilty." Tr. 4489. If anything, petitioners benefited from the district judge's decision not to belabor Reyers' absence.

b. Petitioners next argue (91-199 Pet. 28-29; 91-439 Pet. 34) that Reyers should not have been permitted to testify for the government because he pleaded guilty in the middle of the trial, and that his post-guilty plea testimony was highly prejudicial. Petitioners cite no authority for their proposed "bright line" rule (91-439 Pet. 34) that testimony of pleading co-defendants should be barred if they stood trial for any length of time with the remaining defendants. Absent some showing of prejudice, there should be no bar to a defendant's pleading guilty during trial and then taking the stand. The situation is similar to the more common scenario in which a co-defendant

pleads guilty prior to trial and then testifies. In either case, the jury should be presumed to follow the court's instructions not to use the conviction of a cooperating witness as evidence of the remaining defendants' guilt.[5] *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987) (recognizing the "almost invariable assumption of the law that jurors follow their instructions"); *Lakeside* v. *Oregon*, 435 U.S. 333, 340 (1978); *Opper* v. *United States*, 348 U.S. 84, 94-95 (1954).

In its final charge, the district court directed the jury to focus on the defendants alone in determining guilt or innocence:

> [A] lot of names have been mentioned in this trial and you are not called upon to decide the guilt or innocence of anyone other than these defendants.
>
> You are expected to consider the evidence as it devolved around those other persons' names as

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[5] The Fifth Circuit faced an analogous issue in *United States* v. *Kilrain*, 566 F.2d 979, 982-983, cert. denied, 439 U.S. 819 (1978). In that case, one William Barber pleaded guilty after two days of a drug conspiracy trial and subsequently took the stand. The Fifth Circuit found no Sixth Amendment violation because the remaining "defendants have not demonstrated any actual prejudice resulting from Barber's supposed knowledge of defense strategy, or that Barber communicated knowledge to the government." *Id.* at 983. Petitioners have similarly failed to meet that burden. They have not cited any information that Reyers may have received while a defendant that was communicated to the government, nor have they demonstrated any other form of prejudice. Such prejudice must be proved; it may not be presumed. See *Weatherford* v. *Bursey*, 429 U.S. 545 (1977) (no constitutional violation where government agent posed as a defendant to preserve his cover and met with another defendant and his counsel to discuss upcoming trial, where defendant demonstrates neither receipt of confidential information by the government nor any other type of prejudice).

> it did, but you are not called upon to decide upon the guilt or innocence of those persons. Indeed, the fact that you may think that some of the other persons may be guilty or you may suspect that they may be guilty of certain offenses, or *the fact that they have been found guilty of ~~those~~ offenses is not evidence that any of these defendants are guilty.*

Tr. 4489 (emphasis supplied). The highlighted language was an obvious reference to those government witnesses who had entered guilty pleas.[6] There were no objections to the court's instruction, and it is obvious that it did not amount to plain error. The complete acquittal of co-defendant Fodera, and co-defendant Varisco's acquittal on the heroin distribution count strongly suggest that the jury was able to distinguish among counts and defendants, and did not return guilty verdicts based merely on association. Cf. *United States* v. *Saenz*, 747 F.2d 930, 942-943 (5th Cir. 1984), cert. denied, 473 U.S. 906 (1985).

3. The government introduced evidence of each cooperating witness's guilty plea during direct examination in anticipation of defendants' cross-examination. Petitioner does not seriously contend that this practice, which has been universally approved, was prejudicial. *E.g.*, *United States* v. *Dworken*, 855 F.2d 12, 30 (1st Cir. 1988); *United States* v. *Louis*, 814 F.2d 852, 856 (2d Cir. 1987); see also 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 410[07], at 410-50 & n.3 (1991).[7]

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[6] The government did not call any witnesses who had been convicted after trial.

[7] Gambino claims (91-199 Pet. 26-27, 34) that he was entitled to limiting instructions as to the use of the guilty pleas at the time Reyers and each cooperating witness testified. Neither Gambino nor his co-defendants requested such instructions, and none raised this issue in the court of appeals (except for a

Gambino contends (91-199 Pet. 35-41), however, that even if it was proper to call Reyers as a witness, his conviction still must be reversed because the prosecutor made an impermissible and prejudicial use of the guilty pleas of Reyers and witness Joseph Cuffaro.

Petitioners' summations to the jury focused on the credibility of the government's witnesses, especially William Kane. Tr. 4291-4305, 4313-4335, 4341-4343, 4345, 4373-4374, 4393, 4405-4410, 4412-4414. As the court of appeals found, the prosecutor's comment was an invited response to comments by petitioners' counsel suggesting that Kane was a liar and that Reyers' testimony proved it. It is of course improper, as petitioner states, to introduce the guilty pleas of others as substantive evidence of a defendant's guilt. But the prosecutor did not suggest that the jury should consider the pleas as evidence of guilt; he referred to them solely to rehabilitate Kane's credibility following an attack by petitioners' counsel in their closing arguments. See *United States* v. *Martinez*, 775 F.2d 31, 36-38 (2d Cir. 1985).[8] The record shows that

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passing reference to the fact that no instruction was given at the time of the testimony (Pet. C.A. Br. 45)). This Court therefore need not consider it. *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 237 (1990).

In any event, the failure to give limiting instructions did not amount to plain error since the jury was given an appropriate limiting instruction in the district court's final charge. Tr. 4489. In both of the cases upon which Gambino relies in claiming plain error (91-199 Pet. 34), the guilty pleas had been introduced as substantive evidence of guilt. *United States* v. *Harrell*, 436 F.2d 606, 614-615 (5th Cir. 1970); *Trussell* v. *United States*, 278 F.2d 478, 480 (6th Cir. 1960).

[8] Gambino's reliance (91-199 Pet. 35) on *United States* v. *Eason*, 920 F.2d 731 (11th Cir. 1990), is misplaced. The court of appeals in that case found that the prosecutor had gratuitously elicited from a witness that the defendant's father had been

defense counsel understood the comment to be directed to Kane's credibility rather than to their clients' guilt. See Tr. 4478, 4481. Furthermore, "[t]he trial judge was in the best position to determine the purpose behind these statements, and he apparently had no doubt that these statements were not being used as substantive evidence of guilt." *United States* v. *Arnold*, 890 F.2d 825, 830 (6th Cir. 1989). Finally, as we have noted, defense counsel did not object to or request an expansion upon the district court's instruction to the jury that "the fact that [others] have been found guilty of ~~those~~ offenses is not evidence that any of these defendants are guilty." Tr. 4489.

The prosecutor's comment was invited because petitioners' counsel expressly accused the Assistant United States Attorneys of suborning perjury. See, *e.g.*, Tr. 4401 (comment by Gambino's counsel). In response to this charge of misconduct by defense counsel, the prosecutor was entitled to argue that Kane was not a perjurer and that Reyers had pleaded guilty based on Kane's testimony against him. See *United States* v. *Robinson*, 485 U.S. 25, 33 (1988) (defendant's attorney argued that government had unfairly deprived his client, who did not testify at trial, of opportunity to explain his actions; Court held that this invited prosecutor's otherwise impermissible response that the defendant had the opportunity to take the stand and testify if he so desired).[9] In par-

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convicted of crimes similar to those charged in the case. The court found that this did not constitute proper impeachment of that witness and was highly prejudicial. *Id.* at 734-735. Here, Reyers' guilty plea was properly introduced, and the prosecutor's rebuttal comment was invited by the defendants.

[9] Gambino contends (91-199 Pet. 36-37) that the response was invited only by counsel for one of his co-defendants. In fact,

ticular, the use of Reyers' guilty plea was proper to answer the defendants' introduction of evidence that Reyers, while still a defendant, had said that Kane was a liar. Reyers' decision to plead guilty to charges that were based largely on Kane's testimony, was tantamount to a retraction of his claim that Kane was a liar who had fabricated his testimony at trial. It was not improper for the prosecutor to refer to Reyers' guilty plea for the limited purpose of answering the defendants' reliance on Reyers' comments regarding Kane's credibility. In sum, the court of appeals' fact-bound determination that the prosecutor's com-

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Gambino's counsel in his own closing statement accused the prosecutors of helping FBI agents to "change [their] testimony to suit the prosecution." Tr. 4396-4397. Gambino's counsel then stated "if an agent can be made to do it, can a felon, an informant, facing life imprisonment, be made to color or change his testimony in a particular fashion, if that's what is needed for the prosecution?" Tr. 4396. Gambino's counsel then argued that one of the prosecutors had coached Kane on a particular point during a lunch break. *Ibid.* Gambino's counsel also stated that Gambino was indicted solely because the prosecutors "didn't have the integrity" (Tr. 4387) to recognize that the government witnesses were unworthy of belief. In light of these comments, the prosecutor's use of Reyers' guilty plea to support Kane's credibility was invited by Gambino as well as by the other petitioners.

ments did not invite the jury to misuse the guilty pleas does not warrant further review in this Court.[10]

4. Tony Mannino et al. contend (91-439 Pet. 14-15) that the government failed to minimize the interception of non-pertinent conversations and to advise the district court of the method that was being used to minimize the interception and use of those conversations.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2521, requires that "[e]very order [authorizing electronic surveillance] * * * shall be conducted in such a way as to minimize the interceptions of communications not otherwise subject to interception under this chapter." 18 U.S.C. 2518(5). That provision balances the individual's privacy interest and the government's interest in investigating criminal activity. See *Scott* v. *United States*, 436 U.S. 128, 130 (1978). Section 2518(5) further provides, however, that simultaneous minimization is not required "[i]n the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period." In

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[10] Even assuming that the prosecutor should have avoided the reference to the guilty pleas, it was at most harmless error. An improper summation requires reversal only where "the statements, viewed against 'the entire argument before the jury,' *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 242 (1940), deprived the defendant of a fair trial." *United States* v. *Wilkinson*, 754 F.2d 1427, 1435 (2d Cir.), cert. denied, 472 U.S. 1019 (1985). The prosecutor's comments must be found to have "so infected the trial with unfairness to make the resulting conviction a denial of due process." *Darden* v. *Wainwright*, 477 U.S. 168, 181 (1986). Nothing of the sort occurred here. The prosecutor's remark was an isolated event in the day and a half of closing arguments.

such cases, "minimization may be accomplished as soon as practicable after such interception." *Ibid.*

All government personnel monitoring the communications intercepted by electronic surveillance were given oral and written instructions on minimization and were directed to minimize conversations in English. Tr. 13-14. If the monitoring agent intercepted a non-pertinent English-language conversation, he simply deactivated the listening device. Tr. 27. A large number of intercepted conversations, however, were in Sicilian. Most of those conversations were subject to post-interception minimization by FBI Language Specialist Steven Salvo. Salvo would listen to the beginning of the tape of each Sicilian conversation to determine whether it fell within the scope of the authorization. If it did not, he stopped listening and proceeded to the next conversation. Salvo did not listen to non-pertinent conversations. Tr. 19-20, 81, 96. Only conversations that fell within the terms of the surveillance authorizations were translated. C.A. App. 347-348.

Salvo was the government's sole Sicilian language translator on this investigation.[11] Tr. 55. It was not physically possible for him to monitor the several surveillances that were proceeding simultaneously in connection with this case.[12] Tr. 17. Although the

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[11] Salvo received assistance from another translator who prepared rough drafts of conversations. Tr. 33. Other monitoring agents were trained in Italian. Although the Sicilian dialect is distinct from Italian, those agents were often able to discern whether a conversation pertained to criminal activity. Tr. 36-37, 52-53.

[12] Surveillances were conducted at Leo's Pizza Palace in Pittman, New Jersey; Sal's Pizza in Philadelphia, Pennsylvania; the residences of Simone Zito and Tony Mannino in Eagleville, Pennsylvania; and a black Mercedes Benz automo-

government made every effort to hire additional persons fluent in both English and Sicilian, it was unable to locate individuals who were proficient in Sicilian, who were willing to participate in this type of investigation, and who could obtain the requisite security clearance.[13] Tr. 17-18, 46, 48-49; C.A. App. 348-350. For those reasons, the district court properly concluded that the Sicilian-language conversations were in fact minimized "as soon as practicable" and that "the post-interception minimization procedures used by Agent Salvo were thorough, and limited the government's intrusion into [petitioners'] privacy to both a statutor[ily] and constitutionally acceptable degree." C.A. App. 350.[14]

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bile driven by Simone Zito. Tr. 11-13. The surveillance at the Zito residence, the Mannino residence, and the Mercedes automobile proceeded simultaneously, with Agent Salvo spending much of his time monitoring the Mercedes. When he was not monitoring the Mercedes, he was performing post-interception minimization on conversations intercepted at other locations. Tr. 104.

[13] The case agent was keenly aware of instances in which confidential investigations had been compromised by translators. Tr. 18-19.

[14] The district court in *United States* v. *Gambino*, 734 F. Supp. 1084 (S.D.N.Y. 1990), a criminal case involving Joe Gambino, likewise approved of the electronic surveillance procedures used here. In response to the *Gambino* defendants' objection to post-interception minimization, the district court held:

> The government should only be put to the expense and delay of securing simultaneous minimization if the privacy interests of the defendant clearly warrant such protection. The process of post-interception minimization undertaken by Special Agent Salvo provides essentially the same protection of privacy interests as does simultaneous minimization; in each case, only one government agent is privy to all conversations, and only the relevant conversations are translated into English and preserved as potential evi-

Petitioners infer (91-439 Pet. 12) from the large number of non-pertinent communications intercepted that the monitoring agents failed to minimize. Petitioners do not state whether those conversations were in English or Sicilian. Even if the non-pertinent conversations were in English, the interception of those conversations does not indicate that the agents failed to comply with their obligation to minimize. As the Supreme Court explained in *Scott* v. *United States*, 436 U.S. at 140:

> [B]lind reliance on the percentage of nonpertinent calls intercepted is not a sure guide to the correct answer. Such percentages may provide assistance, but there are surely cases, such as the one at bar, where the percentage of nonpertinent calls is relatively high and yet their interception was still reasonable. * * * Many of the nonpertinent calls may have been very short. Others may have been one-time only calls. Still other calls may have been ambiguous in nature or apparently involved guarded or coded language. In all these circumstances agents can hardly be expected to know that the calls are not pertinent prior to their termination.

This was precisely such a case. Many calls were ambiguous and involved coded language, and the investigation concerned "a wide-ranging conspiracy with a large number of participants." *Id.* at 142.

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dence. Given the difficulty and expense of providing for simultaneous translation of Sicilian conversations, and the delay in activating the wiretaps that such a requirement might have caused, the Court finds that the government's minimization efforts are acceptable under Title III and the Fourth Amendment.

Id. at 1106.

Contrary to petitioners' contention (91-439 Pet. 11), each authorizing judge was fully advised that the government would have to perform post-interception minimization in this case, both in the initial application and in each of the 30-day extension requests. *E.g.*, C.A. App. 205-206. Petitioners rely entirely on the government's omission of any mention of post-interception minimization in the seven-day periodic reports. There was no need to discuss post-interception minimization in those reports, however, because the district court was informed in each 30-day request that the government anticipated the need for post-interception minimization.

Finally, petitioners are wrong when they assert (91-439 Pet. 15) that the government "flagrant[ly] and willful[ly]" disregarded their privacy. Agent Salvo did not listen to any conversation that was determined to be non-pertinent. The only additional invasion of privacy occasioned by post-interception minimization (as compared to the pre-interception minimization petitioners advocate), is that tape recordings were made of certain private conversations, which were then not listened to when it was determined that those conversations were subject to minimization. Neither Agent Salvo nor any other representative of the government has listened to any of those recordings, which remain sealed.[15]

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[15] The procedure followed by Agent Salvo was that envisioned by Congress when it authorized post-interception minimization in the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, Tit. I, § 106(c), 100 Stat. 1856. See S. Rep. No. 541, 99th Cong., 2d Sess. 30 (1986) ("it is contemplated that the translator or decoder will listen to the tapes of an interception and make available to the investigators the minimized portions preserving the rest for possible court perusal later").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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